# United States Court of Appeals for the Second Circuit



**APPENDIX** 

# 74-1699 74-1706

In The

74-1661

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,

Plaintiff-Appellee-Appellant,

VS.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants.

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,

Defendants-Appellants-Appellees

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appeilant.

On Appeal from a Judgment of the United States District Court for the Southern District

# **APPENDIX**

Volume IV, pp. 811 - end

LOUIS E. YAVNER

Attorney for Board of Education 60 East 42nd Street New York, New York 10017 (212) YU6-2255 PAGINATION AS IN ORIGINAL COPY

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Crane-recross

I offer it to Mr. Powers.

MR. POWERS: There is an agreement in the pre-bid conference for the completion contract where there is a mention in Item 48 of the pre-bid conference minutes appearing on page 9 in which it is specified that there is a \$15,000 allowance.

THE COURT: I think that we should go on, Mr. Powers.

Mr. Powers, I have a reference to the requirement. A

I was checking the addenda to see if it had been amended. Paragraph 11.28, interior hardwood flooring and underlayment.

Do you want me to read it?

0 No.

That is 11.28, page 11.13. It calls for hardwood flooring to be installed over a sub-floor and a cushion. It is not specified by name. Apparently Fabrizio submitted vibra-mat as one of various materials to satisfy the requirements of the specifications for a insulation mat.

Why would this not be covered by the \$10,000 or \$15,000 provision that we referred to previously?

The punch list? A

Q Yes.

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This has not been installed yet. The punch list on Fabrizio work had to be work installed, by definition.

Then why would it not be part of the work to be performed by Mars-Normel under the guaranteed maximum of \$403,000?

A We thought it was in the subcontract of the wood flooring subonctractor. As it turned out when we got a copy of that contract between Fabrizio and the wood flooring subcontractor that item was not in his contract.

The bid documents had assumed that it was in that subcontract and they were set up on that basis.

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#### Crane-recross

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- Q Did the Board of Education negotiate with this flooring subcontractor? Did he continue on the job?
  - A Yes.
- And then they obviously negotiated with him as to the amount of work he had performed and had not performed?
  - A Presumably so, yes.
- O And then in their negotiations they apparently did not pick that up?
- A It did not come out, his contract for work under Section So-and-So, but then there was a remote comment that deleted this matter.

THE COURT: As I understand it then, you are saying that the Board did not include this in the general contract of Mars and Normal because it was under the assumption that it was in a different contract, the contract with the subcentractor?

THE WITNESS: Yes.

THE COURT: So you are saying that in effect the Board made a mistake andhaving made the mistake they then had to pay extra money to Mars Normel to get the job done, is that correct?

THE WITNESS: Yes, it was an oversight that ve thought the work was included.

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THE COURT: You included it in your contract with

THE WITNESS: Yes, sir.

THE COURT: But as a general contractor --

THE WITNESS: The information we gave the bidders was that it was included, but in fact it was not in that subcontract, your Honor.

THE COURT: All right.

As I understand it, Mr. Crane, all of the subcontractors, including the flooring subcontractor, entered into a triparty agreement with the Board of Education and Mars Normel, is that correct?

A That is a general statement, yes. There were one or two odd situations.

- O As a general statement it's correct?
- A Yes.
- Referring to the flooring contractor, that is the situation that he fell into, is that not true?

A We fell into a situation whereby we thought that this isolation pad was in the subcontract. A more close review of his contract revealed that it was not, and we had to pay extra to get it.

Q Mars Normel that the flooring subcontractor had subcontracted with Fabrizio?

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Crane-recross

A Yes.

And he would be bound by that subcontract, would he not?

A Yes.

And he was responsible to supply the Board with a complated school, correct?

Λ Right, Mars Normel.

One other item here, Item 25, additional plank for gym roof.

Again, Mars Normel was required to complete the school under its guaranteed maximum contract, wasn't it?

That is correct.

I would assume it would be pretty obvious to anyone of Mars Normel in looking over the school whether there was planking required on the gym coof?

That is correct. The whole g mnasium building was planked with 2 or 3-inch planks. at plank had been delivered to the job just prior to Fabrizio & Martin's termination. The belief was when the rebid documents were written up that there was enough plank on the job to do the whole gym roof. This was the information furnished to the bidders. In fact, there was not enough there and we had to buy more.

Who furnished this information to the bidders?

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Crane-recross

- A Ican't recall. It probably was the result of the inventory taken right after Fabrizio & Martin left.
- Isn't it also a fact that the bidders were responsible for -- not only responsible for but had an obligation under their contract with the School Board to examine the site prior to bidding on it so that they knew exactly what work had to be performed and what work had been already performed?
- A Yes, that is true within the scope of specific information that was issued to them.
- Q The gym roof was part of the completion contract, wasn't it?
- A We specified there was enough plank on hand from our information when, in fact, it turned out there was not.
- O The last item is Item 33, which is a small item, but it's something that, to me, deserves mention. Moving materials and equipment to storage area.

Obviously if Mars Normel had examined the site they knew where the materials were, they knew where the aquipment was, wouldn't that be so?

A That is correct, but we get to the end of the contract and here is a lot of equipment and perhaps surplus material scattered all over the site which they had been

using to complete the work, but now what do we do with it?

There are mortar tubs, pieces of scaffolding, all that sort

of thing. You can't leave it in the middle of the front

lawn. We had to move it off to a storage area.

Q Didn't Mars Normal know this when it took on the contract or should it have not known that it was going to be required to do this? It had to leave the site in a clean condition, did it not?

A At this moment in time that seems like a reasonable allegation, yes. Why it was deemed they should get paid for it, I can't recall at this time.

MR. POWERS: I have nothing further.

THE COURT: Mr. Trager, anything from you?
RECROSS EXAMINATION

BY MR. TRAGER:

I just wanted to ask you, Mr. Crane, with respect to this -- well, I notice when you were talking about the change order in question on the extra work, that roofing item that you just said, \$2282, I salieve Item 25 on that schedule --

A Yes.

Q I notice in the previous schedule which comprises the Board's items of damages, Schedule 2 composed of \$85,000, there is an item there, Julius Watsky. Was

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A Yes, but this was plank. We had to put a roof by Watsky on top of this plank.

Q Is it Watsky that did this?

A This wood plank came from some lumber outfit.

This was 2, 3, 4-inch plank on top of which it was necessary to put a roof. That roof on top of the plank would have been done by watsky. The plank itself would not be waterproof.

- Q Who put that on, not Watsky?
- N Who put the plank on?
- Q Yes, the additional plank for gym roof.
- A Mars Normel.

that the roofer on the job?

- Q So that 5400 item would not be a duplicate?
- A No.

MR. TRAGER: I have no other questions.

THE COURT: Anything further?

MR. YAVNER: No. Thank you.

THE COURT: You are excused.

(Witness excused.)

MR. YAVNER: Mr. Joseph Brandeis of Mars-Normel had been here all yesterday afternoon. I asked him to return at one today, but he has not returned and he was my last witness.

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I wonder whether we might arrange to have the plaintiff go ahead with their case and if Mr. Brandeis shows up we can put him on.

THE COURT: Don't ask me, ask the plaintiff.

MR. TRAGER: Your Honor, my position is that I don't mind starting my case now if Mr. Yavner produces his witness some time today. I think that is reasonable enough.

THE COURT: If he produces him some time before the close of the day?

MR. TRAGER: Yes.

MR. YAVNER: May we have a three-minute recess
so I can go out and call his office and find out if they
have heard from him?

THE COURT: All right, Mr. Yavner, we will take a five-minute recess.

(Recess.)

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MR. YAVNER: Your Honor, I telephoned the office of Mars-Normel and they have not heard from Mr.Brandeis today and they assume he is out in the field. I don't know where to reach him.

I do have an offer of proof of certain documents.

I am told by Mr. Fowler that yesterday Mr. Brandeis left with him his duplicate set of the time-material slips which have the signatures on them of a Board representative. These are not our documents, they are Mars-Normel's documents, but these are the duplicates of the tme and material slips that for some reason or other are lacking from the Board's copies of the requisitions, and I would like to offer them as evidence.

MR. POWERS: Your Honor, I have not seen them.

MR. YAVNER: These are the ones you examined already on the deposition.

THE COURT: Why don't you give him a chance --

MR. POWERS: Again, it is a question, your Honor, of how many times does Mr. Yavner get to put in his case?

This is the information apparently that we have been trying to get through Mr. Crane, through Dr. Fowler, and it hasn't been introduced yet.

THE COURT: He now wants to offer it.

Produces these, your Honor. I would like to cross-examine

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2	him on it. I would have to.
3	THE COURT: I would assume you would.
4	Does that mean that you are not agreeable to
5	their being offered without someone to verify them?
6	MR. POWERS: I have no objection to them being
7	marked for identification, but not introduced in evidence.
8	MR. YAVNER: May I point out one more thing,
9	and that is that Mr. Brandeis was examined on oral deposition
10	by Mr. Powers on this and that these were marked as an
11	exhibit at that oral deposition?
12	THE COURT: He has a right to examine it here.
13	MR. YAVNER: I understand.
14	THE COURT: All right, there is no agreement on
15	it, so let us move on.
16	Mr. Trager, let us go with your witnesses, or
17	Mr. Toplitz, whoever is going to examine. Let us go.
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CLIFFORD Q. CHRISTENSEN, called
as a witness by the Aetna Casualty & Surety
Company, being first duly sworn, testified as
follows:

#### DIRECT EXAMINATION

#### BY MR. TOPLITZ:

Q Mr. Christensen, where do you reside at the present time?

A At the present time, I live in West Hartford, Connecticut.

- Q Give the street and address.
- A 12 Fernwood Road, 06119.
- Q Are you presently employed?
- A Yes, sir.
- Q By whom are you employed?
- A I was an insurance agent, C.H. McDonough Sons, Bloomfield, Connecticut.
- Q Going back to March of 1964, by whom were you employed?

A I was employed by the Aetna Casualty & Surety
Company in Hartford, Connecticut, the Hartford branch office,
Bond Department.

- Q In what position?
- A I was manager of the Bond Department.

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Christensen-direct.

O How long after that did you remain in the employ of Astna Casualty & Surety?

Till June of 1970.

And could you basically give me a short resume of your duties as underwriting manager in the branch?

A I was manager of a branch bond department for the Aetna Casualty. We were charged with both the production and the underwriting of surety bonds.

O Do you recall the circumstances of the bond which Actna wrote on behalf of Fabrizio & Martin in favor of the obligee, the Board of Education, Central School District No. 1, how it was issued on behalf of Aetna to have that obligation?

A Fabrizio & Martin was a regular client of the Astna Casualty branch in Hartford. We issued a bid bond at the time the job was bid and when he was awarded the contract or caused to be executed the final bond.

You say caused to be executed. Did you execute 0 the bond?

A The contract was located in New York and it was our practice to ask an office of the Aetna Casualty to execute a bond that was outside of our territory or state limits. In this case, as I recall, we asked the New York City office to execute the bond for us.

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### Christensen-direct

THE COURT: The office of Aetna Casualty?
THE WITNESS: Of Aetna Casualty, yes, sir.

I think it was on Williams Street at that time and probably still is.

Q Mr. Christensen, I show you Exhibit B marked into evidence, and I refer you to a letter dated March 17, 1964, and I ask you to look at that letter.

A Yes, sir.

Q Can you tell me when was the first time you saw that letter?

A This letter, I believe, I saw this morning for the first time in your office.

Q And could you tell me who that letter is addressed to?

A It is addressed to Mr. E.J. Van Allsberg, President, Board of Education, 130 Main Street, Mount Kisco, New York.

Q And who is it signed by?

A It is signed by Charles W. Fowler, Clerk of the --I can't read the last word.

Q Clerk of the Board?

A Oh, Clerk of the Board.

Q At the time of the execution of the bond, were you aware of any of the facts which are stated in that letter?

(Witness excused.)

THE COURT: All right, Mr. Toplitz, call your next witness.

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m	gtg 1 Moyna- direct
2	THOMAS P. MOYNA, called as a wit-
3	ness by Defendant Aetna Casualty & Surety Company,
4	having been first duly sworn, testified as follows:
5	DIRECT EXAMINATION
6	BY MR. TOPLITZ:
7	Q Mr. Moyna, could you give your present address?
8	A 32-55 71st Street, Jackson Heights.
9	Q Are you presently employed?
10	A Yes.
11	O By whom?
12	A Johnson & Higgins, One Mall Street, New York.
13 14	Q By the way, what do you do with Johnson & Higgins
15	A In their bond department, also.
16	O Going back to on or about March 17, 1964, who
	were you employed by at that time?
17	A The Aetna Casualty & Surety Company at Williams
18	Street in New York.
19	Q In what capacity?
20	A Bond representative.
21	Q Do you recall the circumstances of Aetna Casualty
22	& Surety issuing its performance and payment bonds on be-
23	half of Fabrizio & Martin on the Bedford School or Middle

A Very vaguely since it would be a common thing

School project up at Bedford, New York?

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Moyna-direct

to execute for any branch any bond that had to be in New York City.

Q Let us go back into that.

How did you come to execute the bond?

By the way, let me show you Defendant's Exhibit 38 and ask you, is this your signature on the performance and payment bond?

- A That is my signature.
- Q Could you go into a little more detail as to the circumstances under which you wrote this bond as you recall it?

A Well, once again, we would be advised by a branch office since, if you will look at that it says readent agent on it, also, that any particular bond had to be signed in New York by a resident agent.

If any of our out-of-state branches would want a bond signed, it would just come to New York and would be signed by a resident agent, I being one in New York City, as well as an employee of the company.

Q At the time of the execution of the bond, were you familiar or did you have any knowledge of any of the circumstances which gave rise to the contract being declared illegal and void?

A I still don't.

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Moyna-direct

Q Let me show you the same letter which was dated March 17, 1964, which was attached to Exhibit B and was addressed to Mr. Van Allsberg, President of the Board of Education, and signed by Mr. Fowler.

Were you familiar with any of these facts set forth in that letter?

A No. This is the first I have even heard about the case, period.

MR. TOPLITZ: That's all.

THE COURT: Anything on cross-examination, Mr.

Yavner?

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MR. YAVNER: No. Thank you.

THE COURT: All right. Thank you.

(Witness excused.)

THE COURT: I am assuming, Mr. Powers, that you have no questions of these witnesses?

MR. POWERS: That is correct.

THE COURT: I am not depriving you of your right.

MR. POWERS: I appreciate it, yes.

THE COURT: I do appreciate your forbearance.

RICHARD B. PRATT, called as a witness by Defendant Aetna Casualty & Surety Company, having been first duly sworn, testified as follows:

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#### DIRECT EXAMINATION

#### BY MR. TOPLITZ:

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- Q Mr. Pratt, could you give your home address, please?
- A My home address is 56 Stoddard Avenue, Newington,
  Connecticut.
  - O Mr. Pratt, are you presently suployed?
  - A Yes, I am.
  - Q By whom?
  - A I am with the Aetna Casualty & Surety Company.
- Q What position do you have with Aetna Casualty & Surety?
- A I am superintendent in the bond department at the Hartford branch.
- Q Going back to March 17, 1964, were you employed by Aetna at that time?
  - A Yes, I was.
  - Q And what was your position at that time?
- A I was supervisor of the bond department at that time.
- You heard Mr. Christiansen's previous testimony.

  At the time of the execution of this March 17,

  1964 performance and payment bond on behalf of Fabrizio,

  did you have any personal knowledge or did Aetna have any

  personal knowledge-- when I say Aetna I am referring to the

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830a Pratt-direct

underwriting department -- concerning the underlying facts which gave rise to the contract being declared illegal and void?

- As to myself, no, and as to the underwriting department I do not believe they had any knowledge of it. I certainly did not.
- Did you have any knowledge of the facts surrounding the illegality on or about March of 1965?
  - No, I did not.
  - What about March of 1966?
  - A No, I did not.
- Now I show you that same March 17, 1964 letter written by Mr. Fowler to Mr. Van Allsberg, which was annexed to Defendant Aetna's Exhibit B, and I ask you to look at that letter.
  - A Yes.
- Could you tell me when was the first time you saw that letter?
  - This morning at your office. A
  - Prior to that time had you wer seen the letter? 0
  - Never. A
- What was your position, again, in the Astna Casualty Company or what is your position now? Let us start then and what it is now.

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Pratt-direct

A My position at the time was supervisor of the bond department, which comes under the manager, and my position today is superintendent and it is still under the manager.

Q If you had known the facts as stated in that letter and the subsequent facts that were developed which declared the contract to be illegal, would you have written the bond?

MR. YAVNER: Objection to that question, your Honor. I think that it is improper because it calls for a conclusion by the witness of what his mental operations would have been had various hypotheses occurred.

I don't thing he is qualified to give that answer now.

MR. TOPLITZ: Your Honor, if I might say something since there is an objection to my question, we have a counterclaim for fraud in this action by Astna against I guess you would call it the defendant-plaintiff, whichever position you want to put him in, arising out of their failure to disclose to the Surety Company the inderlying facts which they well knew and withheld, not giving them the opportunity to make a determination whether they were going to write the bond or not, therefore, they wrote the bond and they suffered losses as a result of that withholding of information which is the fraud.

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# Pratt-direct

I say that question is proper.

I asked him if he knew the underlying facts and if he read that letter, if he would still have written that bond.

That is a proper question.

MR. YAVNER: I repeat my objection.

THE COURT: I am inclined to think I have a problem with the question.

I know you are trying to cut it short in time, but it appears to me that the appropriate question would be to ask him if he had known such and such, whatever those facts are, would he have written the bond, whatever facts you are alluding to.

At that point I suppose an objection can be made and we can deal with it. But I think that is the --

MR. TOPLITZ: I understand.

THE COURT: I don't mean for us to get involved, but it does seem to me that we focus the witness' attention more closely on facts, then he can answer the question.

MR. TOPLITZ: Your Honor, the pretrial order has a stipulated set of facts by Judge McLean. May I just have the witness read these facts, which have been stipulated to, and there has been a finding of fact by Judge McLean, and then I can ask him my question, if you don't mind, your

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Honor.

THE COURT: All right.

MR. TOPLITZ: Your Honor, if I may bear on your patience, it is about five pages of facts which have been stipulated to, and it will cut through a great deal of time.

(Pause.)

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MR.

THE COURT: What is the position -- I am not altogether clear-- of Aetna? Aetna got a performance bond for Fabrizio at the instance of the Board of Education?

MR. TOPLITZ: We wrote a performance bond --

THE COURT: At the instance of the Board?

MR. TOPLITZ: The contractor makes application for the bond and we execute the bond. It is our position that as obligee they knew material facts upon which they had a duty to disclose and by failure to disclose these material facts they committed a fraud upon the defendant, Aetna, which entitles us to recover back our losses we paid them on the labor and materials.

THE COURT: You me saying that the obligation is on the Board rather than on your client?

MR. TOPLITZ: Yes, your Honor, hat is a matter of law. It has already been held.

One other thing I ought to point out on the record while the witness is reviewing that. Dr. Fowler testified that he did not disclose this information anyone, if I recall.

If I may have a second to see Mr. Powler's cross-THE COURT: I think it is clear, as far as I can
see, that Aetna didn't know about it, in any event.

MR.YAVNER: We are conceding nobody knew about it

Qg 2

Pratt-direct

until Judge McLean made a ruling.

tion is whether or not it is or may be a legal obligation, you can say. But the Board certainly knew that what it did and Fabrizio certainly knew what the Board did. It may well be that you did not understand the effects of what you did but you certainly knew.

Aetna is arguing that those facts that you knew about and the way that you accomplished execution of this contract that you did not reveal that to them. That is what the argument is. Not the fact of what you did. You knew the assignment that you made, the bid you took, that you made a simultaneous change order and so forth and so on.

You knew that.

MR. YAVNER: There is no question about that.

There is no challenge about that. If he asks for a concession I will concede that without the witnesses. But my position on the questions he is putting, the reason for my objection, is because the underlying facts were known to lawyers. There was a Board counsel at that time.

He advised the Board. There is a question of the legal effect to ask these witnesses whether they would enter into this thing--

THE COURT: Did Aetna's lawyers know how you found

out about that contract? That is the point. You knew about it, Mr. Yavner.

MR. YAVNER: I didn't know about it.

THE COURT: The Board's lawyers knew about it and Mr. Powers started out indicating that Fabrizio was innocent because he had no lawyer at these various conferences and so forth so that he is saying that although he knew the facts he was not aware of the legal facts.

Aetna says that their lawyers did not know anything about it.

Obviously if Aetna had known the facts, the would probably have discussed those facts with its attorneys.

MR. POWERS: If I may, your Honor, I think obviously Fabrizio & Martin knew the facts, no question. That is conceded The question is whether Fabrizio & Martin knew the effects of these facts and whether the School Board knew the effects of these facts.

It is the position that the School Board in fact knew the effects of these facts, went through with it --

THE COURT: The point is that at this time whether they knew the effects, that is immaterial. The only way you can make it clearer is by the argument you started out with and which I suppose you will introduce proof to show that Fabrizio did not have an attorney to advise him.

#### Pratt-direct

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THE COURT: All right.

4 decision to--

MR. TOPLITZ: He was the supervisor, your Honor.

Is this witness the witness who will make the

THE COURT: At that time?

MR. TOPLITZ: Yes.

O I have shown you the decision of Judge McLean in which he sets forth certain relevant facts which he found concerning the entering of the contract and his subsequent finding that the contract was illegal.

I ask you again, how long have you been in the underwriting business?

- A Approximately 35 years.
- Q Has that been as an underwriter on bonds?
- A Starting out in the home office in the court division and then moving into the branch after I came back from the Service handling all lines.
- Q Let me ask you this: Have you ever written a bond where the facts were similar to the situation as the case at bar?

MR. YAVNER: I object to the question on the grounds that no answer can have any application to this case. I thinkit is immaterial, incompetent and irrelevant.

THE COURT: Why?

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Qg 5

### Pratt-direct

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MR. YAVNER: Because what bonds they have issued in the past and what bonds they have not issued on factual situations have no relevancy to this particular factual situation.

THE COURT: What Mr. Toplitz is attempting to show is that the insurance company issued the bonds under certain conditions and he is also attempting, I suppose, based on his experience, to qualify the witness to make or give some opinion to the Court upon this matter.

I think it is a rational point to be made.

- A May I have your question?

  (Question read.)
- A No.
- Q Based on your 35 years' experience, I believe you said?
  - A Yes.
- O In the underwriting of surety bonds and after reading the facts as set forth by Judge McLean and reviewing the letter I showed you as Exhibit B, would you have written the bond in the instant case at bar?

A No.

MR. TOPLITZ: No further questions.

MR. YAVNER: Before I ask this witness any questions, several times I have asked Mr. Trager to give me a

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gtgQg 6 Pratt-direct /cross
list of his witnesses and I want to know it

list of his witnesses and I want to know if Mr. Buckmer is one of his witnesses.

MR. TOPLITZ: He is in court.

MR. TRAGER: I gave you a list and Mr. Buckmir's name was on the list.

MR. TOPLITZ: Mr. Buckmir is a witness and he is in court.

MR. YAVNER: Then I will reserve those questions for him.

MR. TRAGER: I gave him a list that had all these gentlemen on it.

THE COURT: All right.

#### CROSS-EXAMINATION

### BY MR. YAVNER:

O Sir, have you ever had occasion during these past 35 years to inquire whther seals of any kind were placed upon a contract?

- A I don't quite follow your question.
- Q In connection with contracts between business firms
  have you ever made inquiry whether the seal of a corporation had been placed on a contract?
  - A Yes, I have, I believe.
  - Q In what connection was that?
  - A It would be in connection with a bond that we had

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Pratt - cross

written where we place our seal on it.

- Q You mean on the bond document itself?
- Correct. A
- On the application for the bond?
- A The bond itself, sir. The performance bond and the payment bond, sir.
- 0 Isn't the performance bond signed only by the bonding company?
  - Signed also by the contractor, sir.
- And so you require the contractor to put his seal on too?
  - If it is a corporation and has a seal, yes. A
- In connection with the contract which you are bonding, have you ever in your experience asked for examination of the contract prior to the time that you wrote the bond?
  - On some occasions we have.
  - Would you describe them to me?
- The occasions where it might be is wherewe are dealing with a private job where we would like to see the contract and see what the wording of the contract is. There are occasions when we are dealing with a state or a public body and these contracts we have seen and know what is in them and we don't look at the particular time.

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## Pratt-cross

O Do you inquire about whether a seal has been put on those particular governmental contracts?

A No, sir, I do not inquire as to whether a seal has been put on.

Q Do you know whether a seal has been put on those contracts or not?

A If I do not see them I would not know.

O In other words, it has never made any difference to you in bonding those Government contracts whether there was a seal on them or not, isn't that a fact?

A We would assume there would be a seal on the contract.

- Q You assumed, but you never made inquiry, did you?
- A In some cases but not in all cases.
- Q I am referring to the Government contracts.

Can you tell me any case in which you ever made an inquiry on which, whether the seal had been placed on a Government contract?

A Not a specific case but I am sure I have seen them.

Q But you have no recollection of any such instance, isn't that a fact?

A Yes, I have seenthem on occasion but I can't give you a specific case.

FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

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Qg	9	Pratt -	cross

- Q You have seen what on occasion?
- A Contracts with a seal on them.
- Q But where you have not seen the contract have you inquired about whether there was a seal on them?
  - A No, sir.
- Q Had you seen this particular contract before you agreed to write the bond?
  - A No, sir.
  - Q Did anyone in your organization see that?
- A I cannot answer that, sir, I don't know for certain.
  - Q You are the supervisor of the bond department.
  - A The bond was executed by our New York office.

    MR. YAVNER: Thank you.

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Pratt-redirect

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REDIRECT EXAMINATION

BY MR. TOPLITZ:

Let me ask you this. Was the amount that was set forth in the bond any different than the price that was awarded in the contract to Fabrizio? Was there any change in the award price of the bond, the amount set forth in the bond?

- Would you give me the amounts you have there? A
- The award of the contract was for \$2,489,000--0

MR. YAVNER: If your Honor please, I may have misheard but I think the question was, was there a difference between the amount of the sward, the amount of the contract and the amount of the bond.

The witness I think is saying that he would like to hear the figures and counsel is about to give the figures.

It is not the witness who is going to be answering.

THE COURT: I agree. Objection sustained.

I show you Exhibit 98 and I ask you to look at that document.

I direct your attention specifically to the performance bond which is annexed under there.

A Yes.

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SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SOUARE. NEW YORK. N.Y. CO 7.4580

Pratt-redirect /Pecross

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Do you see the amount stated in the performance bond? A Yes.

Was the amount stated in the performance bond any different than the amount stated in the bid bond?

That I can't answer. The contractor does not give us his exact figure that he is going to bid. When he requests a bid bond it is a percentage bid bond, as a rule.

We do not get the exact dollar figure that the contractor is planning to bid. He gives you the area of it.

Q Let me ask you this. Was the price that you put in the performance bond any different than the amount that was awarded as to Fabrizio, to contractor?

A I would say no. That was the amount that was awarded.

RECROSS-EXAMINATION

BY MR. YAVNER:

Am I to understand then, Mr. Pratt, that it makes no difference to you what the exact amount of the contract is so long as it is within a percentage ball park?

MR. TOPLITZ: He didn't testify to that.

MR. YAVNER: He spoke about a percentage.

1	Qg 3 Pratt-recross 651
2	Q What is the purpose of this inquiry?
3	MR. YAVNER: If they have no knowledge, I con-
4	cede it, your Honor.
5	THE COURT: All right.
6	You are excused.
7	(Witness excused.)
8	• • •
9	HAROLD WAREHAM, called as a witness
10	by Defendant Aetna Casualty & Surety Company, having
11	been first duly sworn, testified as follows:
12	DIRECT EXAMINATION
13	BY MR. TOPLITZ:
14	Q Mr. Wareham, would you please give me your
15	home address.
16	A 56 Elwood Road, Manchester, Connecticut.

- Q Are you presently employed?
- A Yes.

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- Q By whom?
- A Aetna Technical Services of Hartford, Connecticut.
  - Q How long have you been employed in that present position?
    - A One year.
    - O And prior to that?

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A	Prior to	that I wa	as with	the Sec	curity	Inst	rance
Group in	Hartford	and prior	to tha	t with	the A	etna	Casualty
& Surety	Company.						

- Q What was your period of employment with Astna Casualty & Surety Company?
  - A 1950 to 1968.
- Q What was your position, say, in 1964 through 1968?

A I was a department manager as was Mr.Christiansen at that time at the Hartford branch of the Aetna Casualty & Surety. I was claim manager or manager of the claim department.

Q What did those duties entail? What duties did you have as claim manager?

A Supervision of the claim department in that branch office.

O Could you tell me what your familiarity was with performance and payment bonds written by the Astna Casualty & Surety Company on behalf of Fabrizio & Martin in Bedford School project in question?

A Well, the bond--

Q Rather than have you do it that way, when was the first time that you heard about the bond written by Fabrizio & Martin?

1	Qg 5	847a Wareham-direct
2	A	I suppose about the time that the
3	arriving	by way of our home office from the
4	the owner	
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6	O	From whom?
7	A	From whom in our home office?
8	0	From whom were the letters writte
9	A	To whom or from whom?
	o	Who sent the letters to you?
10	A	Well, I think the owner.
11	Q	Subsequent to those letters did
12	to meet	with the owner or the owner's repr
13	A	On one occasion.
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15	· °	Only one occasion you met with his
16	λ	With the owner's representative,
17	Q	Anyone else from the owner did yo
	other the	an that one time?
18	A	No.
19	Q	Who did you meet, do you recall,
20	Give me	the date, if you recall it.
21	A	
22		I believe it was in March, probab
23		r. Powers was there with Mr. Fabri
24	at the Bo	oard of Education's office at the
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653 e letters started he exchitect and/or en? you have occasion resentative? Lm? yes. ou ever meet at that time? oly March 21, izio. We met invitation of the president, Mr. Van Allsberg. Mr. Yavner was there. I don't recall thenames of the other gentlemen who represented

the owner.

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Q Did you say 1966 or do you mean 1965? Maybe if I might make a statement.

The termination date is in 1966. That is the final termination.

- A The final termination date, I believe, was March 16, 1966.
  - O Yes.
  - A We met there, I believe, March 11, 1966.
- Q And prior to that date you had not met with anyone from the Board or its representatives?
  - A Yes, I had not met with anyone.
- Q And at that one and only meeting was it ever disclosed to you any of the underlying facts concerning the illegality, or which gave rise to the llegality of the contract?
  - A No.
- Q Could you tell me what was basically discussed at that meeting generally?
- A As I recall, Mr. Van Allsberg convinced Mr.

  Christiansen and me to attend as a working meeting on the job site to determine or to review the various job problems to see if these could be resolved and work progressed toward the satisfactory completion. That is my general

recollection in my own words.

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O Did you attend that meeting?

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A Yes, this is the March 11th meeting.

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O Could you tell me what occurred at that meeting?

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A I can't recall all of the words that were said.

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Q Generally.

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A My general impression is that first of all the

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meeting did not occur on the job site as we were led to

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believe. After getting on the job site and finding no

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one there we went to another school, found someone there,

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and they told us where the Board of Education offices

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were at that time and we went there and found the meeting.

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I recall the meeting -- first of all, I would like

I recall that we were not permitted to stay in

Don't give me your personal observations, just

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to state that the Surety would be attending as an ob-

charges and countercharges, complaints and answers to

complaints between the owner and the contractor.

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server.

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the role of an observer and I felt that there were various

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We felt --

what occurred.

A That is what occurred.

Q Subsequent to that time did you ever have

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Qg 8			Wareham-direct/cross					
occaion	to	meet	with	the	Board	or	its	representatives?

A No.

MR. TOPLITZ: That's all.

#### CROSS-EXAMINATION

## BY MR. YAVNER:

I show you Exhibit 98 and call your attention to the signature at the bottom of this change order.

Would you read it to us, please.

A Edgar J. Van Allsberg is the top signature and I can't read the bottom one.

Q The bottom one is Fabrizio.

It is this Mr. Van Sllsberg with whom you met and with whom you spoke in connection with this meeting, is that it?

- A If he is the president --
- Q You referred to Mr. Van Allsberg?
- A Yes.
- Q How do you know his name?
- A He called me on the phone, identified himself and asked me to attend and he talked with me personally.
- Q And this occasion in 1966 was the first time that you had ever spoken with Mr. Van Allsberg?
- A It was the first time I had spoken to Mr. Van Allsberg.

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Mr. Wareham, would it surprise you to know that on March 11, 1966, the president of the Board of Education was a Mr. Mactey and would it surprise you to know that Mr. Van Allsberg left the Bedford Board of Education in June of 1965?

A Frankly, yes, because my recollection is that

I talked with Mr. Van Allsberg. That is who called me
on the phone. I assume he was yet president of the Board.

I believe he was the one that asked us to attend.

- Q You had never met Mr. Van Allsberg before?
- A No.
- Q Or have any conversation with him?
- A Not to my recollection, no.
- Q Did you make a memorandum of this telephone call?
- A No, I believe I didn't because it was a very straight—probably a note to the file, perhaps. Mr. Christiansen was present at the time the call came in and we discussed it and since it involved the two of us going there it was a rather straightforward matter of would we go or would not we.
  - O Did you make a memorandum of your meeting?
  - A Either Mr. Christiansen or I did, I am sure.
  - O Do you have a copy of that memorandum here?
  - A No, I don't.

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Wa	reham-cross	/redirect

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Q When is the last time you looked at the memorand-um?

A Probably before my resignation from the Aetna Casualty & Surety on February 2, 1968.

Q Do you have a present recollection as to whether the memorandum mentions Mr. Van Allsberg?

A No, I don't.

MR. YAVNER: Thank you.

### REDIRECT EXAMINATION

## BY MR. TOPLITZ:

Qg 10

Q Couldit be possible that you are mistaken as to the date? Could not it have been February 15, 1965 when you met, rather than 1966, or maybe March at that time?

A If I can look at my note. I did make a note in my file.

I have marked 11/66 in a note to myself.

MR. TOPLITZ: No further questions.

MR.YAVNER: I have no questions.

THE COURT: Thank you very much.

(Witness excused.)

853a 1 Wiley - direct 6a gtg 1 2 THE COURT: Who is your next witness? 3 MR. TOPLITZ: Could I have just one minute, your 4 Honor? 5 (Pause.) 6 7 WILEY, called as a witness by JOHN 8 Defendant Aetna Casualty & Surety Company, having 9 been first duly sworn, testified as follows: 10 DIRECT EXAMINATION 11 BY MR. TOPLITZ: 12 Mr. Wiley, could you please give me your present 13 home address? 14 1502 Chauncey Lane, Richmond, Virginia. A 15 Are you presently employed? 16 Yes, sir. A 17 By whom are you employed? 0 18 Aetna Life and Casualty. Aa 19 And what position? Q 20 I am manager of the claim department at the A 21 Richmond, Virginia branch office. 22 And prior to that time, were you also employed 23 by Aetna? 24 A Yes, sir. 25 Q Where were you employed?

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Wiley- direct

A I was manager of the claim department at the Bridgeport branch office.

Q Could you tell me how you became familiar with the Fabrizio & Martin project for the Bedford school system?

A As I recall it, it was early in 1965, I was asked by our Hartford branch office, perhaps Mr. Wareham, but someone in the Hartford branch office to attend as an observer a meeting that was to be held in Bedford. I think it was an open public meeting of the School Board to consider the construction of the school that was being built there.

- Q When did you say this was?
- A It was in January. I am not sure of the date. I think probably January 21, 25.
  - Q What year?
  - A 1965.
  - O And did you subsequently attend that meeting?
  - A Yes, sir, I did.
  - Q Could you tell me what occurred at that meeting?
- A I can't really be very specific. I went as an observer. I knew none of the facts concerning the bond, I knew none of the facts concerning the construction, I knew nothing of any problems.

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•	gtg 3 Wiley-direct 663
2	I met Mr. Fabrizio there and he had an attorney
3	with him, I think a Mr. Hines, and I believe Mr. Yavner
4	was present at that meeting, and several members of the
5	
6	School Board and some other spectators, and frankly, my
7	recollection of the meeting was that it was really a lot
	of charges and countercharges that proved nothing.
8	0 Were any facts discussed with you concerning the
9	underlying facts which gave rise to illegality?
10	A No, sir.
11	Q Change order or anything like that?
12	any army size and are
13	A No, sir.
	Q Did you subsequently have any further meetings o
14	contact with the Board or its attorney?
15	A No, sir.
16	MR. TOPLITZ: That's all.
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18	Your witness.
	MR. YAVNER: I have no questions.
19	THE COURT: Thank you.
20	(Witness excused.)
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23	MICHAEL J. BUCKMIR, called as a
	witness by Defendant Aetna Casualty & Surety Company,

having been first duly sworn, testified as follows: DIRECT EXAMINATION

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1 gtg 4 Buckmir-direct 2 MR. TOPLITZ: Your Honor, I might add that I 3 would have one witness that isn't here today, but it will be Mr. Fabrizio who will be a witness, and if you don't mind I will use him at that time rather than bringing him 6 twice back and forth. 7 I have a couple of other witnesses, also, your Honor, but I mean as to Mr. Fabrizio. 9 This witness will take some time. 10 THE COURT: Is this witness going to be a long 11 one? 12

MR. TOPLITZ: Yes, very long, your Honor, I feel.

MR. YAVNER: Very long?

MR. TOPLITZ: Yes.

MR. YAVNER: I would hope --

MR. TOPLITZ: When I say very long, I don't think it will be long, but I know it is going to be long on cross.

THE COURT: I am not going to go beyond 5:30 tonight.

Is there anything you want to say, Mr. Trager? MR. TRAGER: I think you put a mandate on Mr. Yavner to bring his witness in by five or something. THE COURT. I said before the close of the day.

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- Q Did there come a time when you first heard of the project under which Fabrizio and Martin was performing work called the Middle School at Bedford?
  - A Yes.

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- Q Could you tell me the occasion on which you first came in contact or first heard about this bond which was written by Aetna on behalf of Fabrizio?
- A Actually, I became first aware of it in, I believe, January 1965, because I heard about it from my superior, Mr. Wiley, who had related to me his wisit to Bedford.
- Q As a claim rep, did there come a time when you would receive claims by labor material men against the labor-material bond?
- A To my recollection, I became actively involved in handling claims in February or March of 1966.
- Q When you say you got involved in handling claims, what do you mean by that? Did you receive complaints by labor and material men?
- A We were receiving letters of notice of claim from various labor and material men.
- What would you do once you received a claim from labor or material men? In this particular instance, what did you do?

Buckmir-direct

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A We would acknowledge the claim, tell the party involved that we would conduct an investigation and then conduct an investigation into the claim.

Q Did there subsequently come an occasion where you were required to make payments to labor and material men?

A Yes.

O I now show you a list and ask you to identify this list.

A This is a list that I prepared of the various claimants, identifying them and over here in the right column, the amount of payment.

MR. TOPLITZ: I wouldlike this marked for identification at this time.

(Defendant's Exhibit No. 32 received in evidence.)

## Buckmir-direct

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MR. TOPLITZ: Your Honor, I have here and I am going to avoid if possible and shorten the trial—for each claimant there I have the entire claim file as well as the draft payment, and I ask Mr. Yavner at the pesent time whether he is going to require me to introduce each draft, each claim file and the payment made thereunder, which is represented on that list.

MR. YAVNER: I would know better if I had an opportunity, I suppose, to look through it all.

THE COURT: I beg pardon?

MR. YAVNER: I said I would know better if I had an opportunity to look at it.

THE COURT: I think what you can do with that is this witness is probably going to have to be back tomorrow so you will have tonight to study it.

What is the issue about the claims? I don't understand that.

MR. TOPLITZ: Your Honor, these are the resulting damages which Aetna suffered as a result of having to write the labor and material men--

THE COURT: I now understand. You are now in the process of proving your counterclaim.

MR. TOPLITZ: Yes.

THE COURT: I was a little confused about that.

All right.

MR. YAVNER: I will have to look at all of them.

THE COURT: You can go on, Mr. Toplitz. And we will postpone the decision on the admission of the documents until tomorrow.

Turn the material over to Mr. Yavner at the close of the trial. He will study it and he willmake a decision tomorrow morning.

MR. TOPLITZ: Do you want me, your Honor, to start introducing each document now?

THE COURT: No. Let Mr. Yavner study them overnight and then maybe he will agree.

MR. TOPLITZ: That creates a problem, your Honor.

To be honest with you, I was planning on going through

line of questioning and then basically I didn't have that

many more questions for the witness.

THE COURT: We are going to have to do it that way. Mr. Yavner has to look at the documents.

MR. TOPLITZ: May I make for the first time a request by the Defendant Aetna that this matter be adjourned to give Mr. Yavner an opportunity to look at these documents?

THE COURT: You have no further questions of this witness?

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MR. TOPLITZ: I do, your Honor, but as to these documents.

THE COURT: It seems to me as I understand where we are that you are attempting to establish a claim of the total of the amount of claims paid by Aetna?

MR. TOPLITZ: Yes, your Honor.

THE COURT: In terms of your counterclaim.

All we have established so far as I can recall from this witness is that he has made up that list. Maybe we can elicit that he paid it all and so forth and we can be that far ahead for the next few minutes and then if Mr. Yavner looks at the various claims and is satisfied that they do represent the amounts paid, maybe we will save a lot of time.

I suspect that there is not going to be any dispute about it, but in any event, Mr. Yavner has a right to look through it.

Q Let me ask you this.

Did Aetna Casualty & Surety Company write a labor and material bond?

A Yes.

O Did you use that labor and material payment bond as a guide to govern you as to whether you were obligated to pay labor and material men?

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A Yes.

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Q And did you subsequently receive these claims that you have in that schedule, which is identified as Defendant's Exhibit 32? Did you subsequently receive claims for labor and material?

A Yes.

O And did you investigate wach one of these claimants on this list? I believe you have a total of 51 listed, but not all of them are claimants which you have paid?

A Yes.

Q And those which you have on the right-hand side under Amount Paid you subsequently paid them, correct?

A Yes.

Q Andcould younge into a little onewhat you did to determine whether these were valid claims for labor and material?

A Following the initial receipt of notice and subsequent acknowledgment, the routing type of investigation that we would conduct would be to check our principal records thoroughly.

Q Did you in this instance?

A Yes.

To contact the claimant and do so with his records, check the subcontract agreement if it was a

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subcontractor, check the billings if it was a supplier, make sure that the items were covered under the bond, check the ledger sheets, the payment sheets, what was owed, what items were in dispute.

This is the routine thing you followed in checking these claims.

- Q Is this what you, in fact, did, in this instance?
- A Yes.
- And each one of these people you paid on this list which has an amount on the right-hand side of that schedule was a payment for labor and material, am I correct?
  - A Yes.
- What was this payment evidenced by? What did you pay him with?
  - A Company draft.
  - O Do you have the drafts with you today?
- A Yes. The drafts are attached to each one of those claim files, the corresponding payment drafts attached.
- Were each one of those drafts negotiated by the payee on the draft?
  - A Yes.
- Q Was the payee in each one of these instances these people listed on this schedule?
  - A Yes.

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Q And could you tell me what the total amount of payments came to by Aetna?

THE COURT: I was wondering when you were going to get to that. All right.

A \$114,609.58.

THE COURT: All right.

I think that that exhibit, if " am not mistaken, --

MR. TRAGER: It should be a letter, your Honor.

It should be Exhibit D.

THE COURT: So that is not properly marked. That is the additional Defendant's Exhibit.

MR. TRAGER: I think we went A, B, C and this is D.

THE COURT: This is the next line, so it should not have a number.

(Defendant's Exhibit D marked for identification.)

THE COURT: I gather we are at the point where

Mr. Yavner will look over those claims on that list and

see whether there is any discrepancy. If there is no discrepancy, I trust that you will be able to have a stipulation that the Additional Defendant's Exhibit D is an accurate depiction of the claims which Aetna paid.

All right?

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		MR.YAVNER:	Yes, your	Honor.	671a			
		THE COURT:	We will	adjourn until	ten o'clock			
	tomorrow	morning.						
			to 10:00	a.m. Wednesda	y, March 7,			
	1963	.)						
				Esp.				

		00/8				
1		WITNESS INDEX	672			
2	Name	Direct Cross	Redirect	Recross		
3	Charles W. Fowler (Resumed)	*	475	514		
4						
5	Robert F. Crane, Jr. (Resumed)		556			
6		EXHIBIT INDEX	100			
7	Defendants	Identification	In Evid <b>e</b> nc	e		
8	24		492			
9	25		494			
10	26		495			
11	30		499			
12	34		501			
13	41		505			
14	49		507			
15	50,53		508			
16	54		509			
17	55		510			
18	122		513			
19	109		558			
20	100		560			
21	101 through 106		565			
22						
23						
24						

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# WITNESS INDEX (Continued)

Name	Direct	Cross	Redirect	Recross
Clifford Q. Christensen	629	632		
Thomas P. Moyna	633			
Richard B. Pratt	636	645	649	650
Harold Wareham	. 651	656	658	
John Wiley	659			
Michael J. Buckmir	661			
	EVHIBIT I	NDEY		

## EXHIBIT INDEX

Defendant	Identification Evidence	
32	665	
D	671	

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FABRIZIO & ARTIN, INCORPORATED, Plaintiff,

VB.

THE BOARD OF EDUCATION CENTRAL SCHOOL 66 Civ. 2935 DISTRICT NO. 2 OF THE TOWN OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants,

and

AETNA CASUALTY & SURETY COMPANY, Defendant.

New York, March 7, 1973.

Trial resumed.

MR. TOPLITZ: Your Honor, I would like to make an application at this time to put another witness on the stand for a short period of time. It's Mr. Greenberg, and since ha is my boss and does have another meeting, I would like to put him on. It would be very short testimony.

THE COURT: It's agreeable to me.

Mr. Toplitz, and you got to a point where you can have a stipulation to that?

MR. TOPLITZ: He is not going to object to the introduction of the documents.

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MAX E. GREENBERG, called as a witness on behalf of Aetna Casualty & Surety Company, being first duly sworn, testified as follows:

### DIRECT EXAMINATION

### BY MR. TOPLITZ:

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Q Mr. Greenberg, do you maintain law offices in the City of New York?

- A Yes.
- Q Where are they located?
- A 100 Church Street.
- O Have you been practicing law for a long time?
- A For over 50 years.
- Q Can you give me a little background on your legal experience?

A I have been specializing practically all that time in construction contract matters and I am well known in the construction contract field.

- Q Have you written any articles?
- A Yes, numbers of articles.
- Q Could you name just one or two of them?
- A On changes and change conditions on the jurisdiction of the United States Court of Claims, on the effect
  of the environmental statutes on construction contracts,
  on subcontracting. There were a number of

gp3 Greenberg-direct

articles.

O Going back in time to on or about the end of March, 1966, were you retained by Aetna Casualty & Surety?

A Yes, on March 30, 1966.

O In what matter?

A In this particular controversy involving Fabrizio and the Bedford Middle School District.

Q Subsequent to your being retained as counsel did you have occasion to meet with the various parties in this action?

A Yes, at a meeting involving Fabrizio and the representatives of the Board and their attorney on April 5,

Q Could you tell me what occurred at that meeting?

A At that time we stated to the attorney for the Board and the clerk of the works of the Board that we were willing - I was representing Aetna at the time and that we were willing to see the contract through to completion.

Fabrizio said that he would complete so that they could occupy the buildings by July the Istprovided he had cooperation from the independent contractors for mechanical trades. We also said that we would pay for the cost of their bidding, advertising for bids at that time for completion contracts.

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There was only one problem and that related to the fact that the Board at that time was deducting liquidated damages, and we said that we would insist that they withhold the deductions of liquidated damages until the final payment, at which time they could deduct their liquidated damages and we would then arbitrate all of our differences including the liquidated damages and other claims and so forth.

I did not have present at the time a representative of Aetna but I called on the telephone and then they later advised me that they would go along with that arrangement.

Mr. Yavner had left by that time, so I called his office and left a message to that effect. He was to let me know whether that arrangement with reference to withholding the deductions of liquidated damages would be agreeable to the Board. Then I called him on a number of occasions and wasn't able to get him for several days.

Finally, I got him on April 11, at which time he said the Board had not yet arrived at a decision, and they were still taking bids.

Within a day or two later, I spoke to him and he said they were taking bids that afternoon and they just

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following Wednesday.

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Greenberg-direct

wanted to see what was going to happen on the bids and he would let me know afterwards what the Board had decided to do, that they were having a meeting with the Board on the

He called me about three days later and told me that they had decided to let the job out to these bidders and that was at a total cost of approximately 500 to 510 thousand dollars for the cost of completing contractors.

That was in essence what happened.

Could you tell me, Mr. Greenberg, I see you are referring to documents.

Could you tell me what kinds of records you keep? We keep slips indicating each day exactly what was done on a particular matter, who was present, the time we spent on it and what occurred on that particular day.

0 Are these records you keep in the ordinary course of business?

They are.

Let me ask you this: are you familiar with the decision by Judge McLean in this action, the facts of which have been stipulated in the pretrial order?

I am familiar with the decision of Judge McLean, but there were two decisions and I don't recall offhand just

8742 1 gp6 Greenberg-direct 2 which one was McLaan's. 3 The one that declared the contract illegal. 4 Yes, I am familiar with that. Λ 5 At the time of your discussions at these meetings 6 were you at any time aware of any of the facts which are 7 set forth, the findings of fact set forth in Judge McLean's 8 decision? 9 No, at that time we did not know anything at all 10 about that, whereby the cost of the work was reduced and 11 the contract was let at the same price as bid. 12 MR. TOPLITZ: That is all I have. 13 THE COURT: Mr. Greenberg, this was on April 5, 14 19667 15 THE WITNESS: April 5, 1966, when Mr. Yavner 16 was present with the clerk of the works. 17 THE COURT: That was subsequent to the time of the termination by Pabrizio, is that correct? THE WITNESS: Yes. THE COURT: The conference had reached the point that Fabrizio had walked off the job already? THE WITNESS: It was at a point apparently where they already had advertised for bids for completion

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the advertising.

contracts because we said we would pay for the cost of

Greenberg-cross

CROSS EXAMINATION

BY MR. YAVNER:

Q Mr. Greenberg, the records to which you have been referring, are they records made contemporaneously by you?

A They are made at the very same time or immediately after the end of the meeting. I probably wrote while the meeting was in progress, which is the way I customarily do it.

MR. YAVNER: May I ask the witness to show me the records to which he is referring.

A Yes, the one on April 5, this is it. It even shows the time. We were together an hour and 35 minutes while you were there.

Q And these are the records to which you are referring, may I have them all?

A Yes. I will try to put them in order so you won't be confused.

I think these are in order now, I am not sure.

There was one thing I left out. The surety
was willing to advance the money toward aiding Pabrizio to
complete, but they insisted they wanted security at the

THE COURT: And did Fabrizio agree to the security?

time. That was the only condition they made.

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THE WITNESS: Yes, they agreed to it.

THE COURT: Mr. Yavner, you were at the conference?

MR. YAVNER: Yes, your Honor.

There were two conferences, as I recall.

THE COURT: I am merely attempting to speed this

up.

THE WITNESS: I don't think there was another conference at my office. There was one on the telephone that I had with you. It was a long one presumably on the 14th of April, 1966, when you gave me the details of the matter in which you were issuing completion contracts and what the costs were and so forth. But I don't think you were at my office, at least during that period. You had been there, of course, on other occasions but not during that period.

May I see the typewritten memorandum that you have prepared?

This was part of my bill to the Aetna Insurance A Company.

If you will call my attention just to the section that rel. 'es to this first conference that you allege, please.

The first one is on April 5, right here; and I summarized it. The verbiage may a little different on

the bill than on the slip. The other one where you gave me the details was on the 14th of April and in between that you had called me and told me you were taking bids and you were going to let me know that the Board was going to meet the following Wednesday.

Q By the clerk of the works, was it possible that you were mistaken by that and that you meant the clerk of the Board?

That is what I was told. Whether he was the clerk of the board or what other designation he may have been called, I don't know. But my memorandum indicates clerk of the works and he was the representative of the Board who was present with you at the time.

Q At this meeting of April 5, am I to understand your testimony, that on that day you offered to have Pabrizio complete the contract?

A Yes, Fabrizio at the time said that he would be able to get it done to the point where you could occupy it. I don't know if he meant one hundred per cent completion, but you would be able to occupy it providing he wasn't held back by the mechanical trades. We said we would even pay for the cost of your advertising.

Q Were there no conditions to that offer on his

Greenberg-cross

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part?

A There was a condition and the condition was that you would not withhold the moneys pending that completion until you got to the final payment by reason of your claim for liquidated damages.

The point was that we wanted to advance less money that we otherwise would have had to advance if you were going to continue taking deductions.

On that occasion was it the bonding company that was saying that it was going to take over and assume responsibility for the completion of the job or were you acting as a kind of friendly middleman for Fabrizio to try to get the Board to take Fabrizio back?

- A No. I wasn't representing Fabrizio at all.
- Q I didn't say that, Max.

Were you given your auspices of your office so that Fabrizio could make a plea to be admitted back to the job?

A I was representing the bonding company and I was acting for the bonding company and I was setting forth an arrangement which the bonding company was willing to go along with and the only question was whether or not the money would be withheld by you for liquidated damages from progress payments and we said that that condition would have to be employed to the effect that you would not withhold that money until the final payment and then we were going to arbitrate the outside the o

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Q Mr. Greenberg, did the bonding company offer on that occasion to take over the contract whether with Fabrizio -- let me withdraw that question and let me put a different question.

Is it a common practice, Mr. Greenberg, in your experience when a bonding company takes over that sometimes it uses the same contractor who had been on the job, although on other occasions it gets a different contractor?

A No, this was not my understanding, it wasn't my understanding that there was going to be a formal termination with the bonding company taking over, it was to continue Fabrizio and we would advance money to Fabrizio, he was to give us security and you would make the usual prograss payments until the final payment, at which time you would deduct your claim for liquidated damages.

Q First me get an answer to my other question.

Is it a common practice forbonding companies in completing a contract under a bond to use the original contractor, or if not a common practice it is sometimes done?

A Well, it is sometimes done. It may or may not be a common practice.

Prequently the owner won't permit them when they take over a contract to use the same man or they may not

Greenberg-cross

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choose to use the same man, depending on how the bonding company feels about it, but on occasion they do that. They take over where there is a termination and the matter is turned over to them, they take over and complete the contract, but they are not required to complete under their bond, and in this case and in most instances they won't complete because if they undertake completion the costs may exceed the penalty of the bond and they don't, therefore, normally want to do it.

Ω Mr. Greenberg, you answered my question with your first sentence or two.

Sometimes the bonding company does use the original contractor to complete a contract?

A Sometimes, yes.

O In this particular instance, was your alleged offer that day that the bonding company was going to take over the completion of the contract under its bond using Fabrizio as the contractor?

A No.

Was your offer that the bonding company was going to assume responsibility under its bond with any contractor to see to it that it was completed?

A Not with any contractor, no. No, it was simply --

### Greenberg-cross

Q All right. Was your offer that day that you were going to assume responsibility under the bond and guarantee to the Board completion of the contract?

A Our offer was ---

Q No, wait. Was that your offer?

A In effect, that was it, but --

Q That you were going to guarantee completion to the Board?

A We had to guarantee completion to the Board.

We had a completion bond and, therefore, we had to guarantee completion to the Board.

O Whether you had to or not, on that day was your offer to the Board that you were going to undetake responsibility under the bond and see to it that it was completed and use Fabrizio as a contractor?

We were continuing our responsibility under the bond. We will give them what money to Fabrizio so he could finish the job, but we weren't deeming it a termination of Pabrizio's contract. The idea was continue with Fabrizio, we will give them what money he needs, provided that you don't in the meantime withhold liquidated damages from progress payments and at the end you can hold your money, but we will arbitrate all of our differences, so the idea was that he would continue and then

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Greenberg-cross

arbitrate and we would advance whatever was necessary.

Mr. Greenberg, you are going a little bit too fast for me, because I am trying to recall the circumstances of that meeting, too, and the reports that I gave to the Board, and I just want to take it a little bit slower if you don't mind.

As I understand your testimony, it is that you were making an offer under which the bonding company would guarantee something, is that correct?

A You can call it that, but it was simply a continuance of our guarantee.

- Q How would you call it?
- A We already had guaranteed completion by Fabrizic at that time.
  - On that day, Mr. Greenberg --

testimony that Aetna had been under an obligation under the performance contract previously to Pabrizio and to the Board and do I understand you to be saying that you agreed to continue your responsibility under that performance contract, provided that Fabrizio gave additional security to them and provided, also, that the Board would not take out, withhold during the course of completion liquidated damages, but would wait until the final payment in regard

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### Greenberg-cross

to liquidated damages and at that point they would be able to withhold them, but the matter would be subject to final resolution by arbitration?

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THE WITNESS: That's right.

THE COURT: Is that what you are saying?

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THE WITNESS: Absolutely right.

THE COURT: I understand.

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0 Do you recall whether your conversation with Fabrizio about his giving additional security to the bonding company was in my presence?

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I don't remember whether it was in your presence or not. Probably not. We may have -- what I think was -- no. it wasn't in your presence and I will tell you why I say

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I had called Mr. Wiley to find out if they would go along with my suggestion on the condition solely on the fact that you would withhold taking deductions and liquidated damages, and then he called me back and he said, "Yes, we will, but we will want security for our advances from Tabrizio."

So apparently you were not present at that time.

Do you recall a meeting at your office, and it was about that time and perhaps it was this April 11th -about April 14th or 15th, according to your memorandum --

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Greenberg-cross

do you recall a meeting in your office where I met with you and described to you --

A No.

Q Wait, wait. It may have been before that.

we were following in connection with letting a new contract and how we were taking over Febrizio's subcontracts, and do you remember praising me for doing that because it was the cheapest way of doing it? Do you recall a conversation of that kind, Mr. Greenberg?

A No. You weren't at my office, to start with.

You called me on the telephone --

Q Wait. You mentioned that telephone conversations.

I had no doubt we had telephone conversations.

I recall we had telephone conversations.

But do you remember my being at your office at or about that time to describe to you the method of completion that we had adopted?

A You did it on the telephone on April 14, 1966.

You were not at my office and I didn't tell you you were
a wonderful guy because we wanted to have that thing finished
our way.

Q Mr. Greenberg, I have a recollection, a very vivid recollection, that we had a conversation either on

Greenberg-cross

the way up to your office or on the way down from your office in the lobby of your office where we were continuing a discussion of this matter. Do you recall that?

A What was that last one?

of what I say is a vivid recollection of mine that either on the way up to your office, and we may have been having lunch together or we may have been going out to lunch together, but in the lobby of your office, either on the way up or on the way down, we stopped there and chatted in the lobby for several minutes and there had been a discussion of the procedure of taking over the subcontracts that Fabrizio had. Do you recall that?

A No, and I certainly have no memorandum of it, sither.

Q Wasn't your original --

A On the 26th of April I called you and you said you would send me the figures on the prices to the sub-contractors. The subcontractors had claims for over one hundred thousand for work prior to February and also some delayed damage claims, and you said that on the supplemental agreement the bonding company agreed to be liable for such damage and you were going to send me a copy of the supplemental agreement, which I had not had, knew

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nothing about, and that you were still interested in the possibility of a 70 per cent settlement. You said that

on April 26th, on the telephone.

Did we have several discussions about a settlement?

You were making suggestions for settlement. A We never indicated we would settle at all, except that we were being required to pay claims of various creditors under our payment bond. Whether we discussed that with you or not, I don't recall.

Do you recall ever making a suggestion to me about a possible settlement figure?

No, no. You were making suggestions and we would not accept any. Fabrizio was contending all the time that you had defaulted, not he, and we were getting stuck for the creditors on --

Mr. Greenberg, wasn't your initial proposal that we take Mr. Fabrizio back on the job and that if there were any problems at the end that they be arbitrated or litigated? Wasn't that your criginal proposal?

That was our proposal, but there was no if about whether there were questions at the end, we were having questions right then and there. Fabrizio was claiming additional sums from you for extras and one

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5 a	gainst each other?	Isn't tha	t your	proposal?
A	That's right.			
2	Thank you.			
Α	Is that all?			
0	That's all			

THE COURT: Anything further?

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### Greenberg

MR. TOPLITZ: No further questions.

THE COURT: Mr. Greenberg, thank you.

(Witness excused.)

MICHAEL J. BUCKMIR, resumed.

MR. TOPLITZ: Just before Mr. Greenberg took
the stand, your Honor, I believe Mr. Yavner agreed that he
would stipulate as to the entry of these records into evidence without objection, and I askthat they now be marked
into evidence, along with the drafts which are annexed thereto.

MR. YAVNER: I have one objection as to four of them, the ones relating to -- if you want to have them marked so I can refer to them by their identification numbers or if I can describe generally to the Court -- there are four --

THE COURT: The problem is what I thought you were doing was that Mr. Buckmir had made a list of claims and I thought what I wanted the stipulation to be was that you would check that list against the claims and if that list were accurate then we could have that filed rather than having the necessity of filing all those claims as evidence of the claims the additional defendant had made. That is what I thought we had done, Mr. Toplitz.

MR. TOPLITZ: I thought we could --

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THE COURT: So there would be no necessity to file all that box of paper.

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MR. TOPLITZ: It is up to Mr. Yavner.

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THE COURT: I think we can still do that. can look over the list and where you have some problem about the contents of a claim, let us look at them and then see

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whether we can deal with those four items rather than having

all those items put into evidence.

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MR. YAVNER: We have checked over the list, your

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Honor. The list is an accurate representation or the amount

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set forth in each of the folders in that box.

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I do object to four of them and I can state the reasons for my objection. I would object to their inclusion

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on the list.

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As to accuple of the others, I do want to have the basic documents put into evidence.

THE COURT: All right. What we will do is we will isolate those items.

Can you identify them on the master list?

MR. YAVNER: Yes. Four near the end that relate to the payment of Welfare Fund payments to the unions.

MR. TOPLITZ: That is 45, 46, 47 and 48.

Your Honor, the witness has also advised me, after going through the file, he does not have the back-up tp

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on No. 20 and he advised me that he realized it after, but he does recall paying it but he doesn't have the back-up on it.

THE COURT: What are the other numbers that you have questions about?

MR. YAVNER: It isn't that I have questions about the amount, but that there are documents in there on which I do want to examine one of these witnesses.

THE COURT: What are they?

MR. YAVNER: As to those four, which I represented as payments to Union Welfare and Pension Punds, according to the back-up documents that are there these are payments owed not by a subcontractor but by Mr. Pabrizio himself.

THE COURT: Let us not go into that.

Am I to understand, then, that this Defendant Exhibit D for identification can be admitted with the exception of Items 45, 46, 47 and 48?

MR. YAVNER: That's correct.

THE COURT: That the rest of the items you deem to be an accurate representation?

MR. YAVNER: Of the contents of his file.

THE COURT: Of the contents of the file.

We will admit it with the exception of those items, and some of the items you want further examination

THE COUPT: Mark each of them separately.

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DIRECT EXAMINATION CONTINUED

BY MR. TOPLITZ:

(Defendants' Exhibit E, F, G and H, respectively,

Q Mr. Buckmir, I show you Exhibits E, F, G and H marked for identification.

Could you tell me, the payments you made there for \$523 in E, \$594.17 in F, \$956 in Gand \$58.10 in H, could you tell me what those payments were about?

A In Exhibit E, \$523.45 was to the Westchester County New York Carpenters Welfare and Pension Fund, Local 1134.

- Q Was this a claim of some sort?
- A Yes.

Yes .

- O A claim for what?
- A A claim for Welfare and Pension Funds that Fabrizio & Martin owed this union.
- O In other words, was this part of the Welfare and Pension Funds which are part of the labor wages paid to the individual withheld and then paid to the union?
  - " I'we each one of those payments represent that?
- A Well, in the four different exhibits, four different unions.

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- Q Yes. But are they all the same?
- A Yes.

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When you made those payments, did you review the bond in question to determine whether these were payments under the bond?

the claims both from the union and I believe the State of New York was involved in this, too, and my recollection is that we consulted with our home office and I believe your firm on this point, and the advice we received from both areas was that this was a legitimate thing to be paid under the bond, and acting on such advice and after receiving the back-up records from the unions involved through the State of New York --

A Yes. Carpenter recap sheet, weekly payroll sheets, the men's names listed.

On the basis of that, we settled these claims, which we determined tobe legitimate under the bond.

- O And you paid the amounts I had previously stated?
- A Yes. Our drafts are right here.
- Q Were these records kept in the regular course of business?
  - A These files right here?

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the union. And the others, who was the employer of these employees on the other three?

as Fabrizio & Martin. The back-up sheats were received from

On Exhibit F, name of contractor is listed as Fabrizio & Martin. The name of the claimant listed on this State of New York, Department of Labor, Claim File Form in Accordance with Section 220-b of the Labor Law is listed as the Westchester County Building Laborers Fund.

But who was the employer of the employees for whom these union payments had to be made?

A On the weekly sheets on this Exhibit F, the name of employer was listed as Fabrizio & Martin, Incorporated.

And on the other two?

On Exhibit G, State of New York, Department of Labor, notice form to us for claims for wages filed in accordance with Section 220-b of the Labor Law, Fabrizio & Martin, is listed as the prime contractor.

Who is listed as the employer of the employees involved?

On the weekly back-up sheets that came attached to the claim form received from the State of New York, the weekly payroll report for -- this would be the Westchester County Bricklayers.

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- Q No. Who is the employer?
- The employer is listed as Fabrizio & Martin, Incorporated.
  - 0 Thank you.

And on the fourth one?

This is Exhibit H. This claim came directly to us without involvement of the State, it came directly from a Mr. Losvalzo.

- Can you tell by looking at it who the employer was?
- A He lists in his reference Fabrizio & Martin, Incorporated.
- Ω Then these were payments, am I correct, to be made to these respective unions in behalf of Pabrizio & Martin itself?
  - A Yes.

MR. YAVNER: I now object to the introduction of these four claims.

MR. TOPLITZ: Your Honor, if I may have Exhibit A, I think --

THE COURT: On what grounds?

MR. YAVNER: On the ground that these were payments made not in behalf of a subcontractor who had been denied payment by the contractor and, therefore, was

amount due, but, rather, that in these instances, although these four unions had the right to go to the bonding company to get payment of the amounts due under their Welfare Funds, nevertheless the bonding company has no right to introduce these claims here when they are the reflection of the failure of the contractor, Fabrizio & Martin itself, to have made the necessary payments to the bonding company.

In other words, I object not that they paid the money to the unions, but that they are trying to claim over against us for Fabrizio & Martin's dereliction.

MR. TOPLITZ: Your Honor, we introduced this as a valid claim made against the labor and material bond and that is for the purpose it was introduced, and he admits it was a valid claim and we made this claim.

Whether it is an item of recovery over against the Board, that is for the Court's determination at another time, but it is not an objection to the introduction of these documents into varience as being valid payments on the labor and material bond.

MR. YAVNER: If that is solely the object at this time and there is no other inference, then, of course, I do admit that these were payments under the payment bond.

MR. TOPLITZ: I would also like to see the first

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exhibit into evidence, the contract and the bonds. They don't seem to be here.

THE COURT: The objection has been withdrawn under your explanation as to the purpose of it.

MR. YAVNER: That's right.

THE COURT: They will be received in evidence.

MR. TRAGER: Your Honor, I would like to make a point on this.

Under the payment bond, which is in evidence as introduced by Mr. Yavner, every item on that list is a valid claim made under that bond. We are introducing these to show the losses we have suffered. Whether we are entitled to damages is another matter for your Honor to decide.

that. There is no argument about it. Mr. Yavner has withdrawn his objection, so they are going to be admitted.

MR. TOPLITZ: I would like to introduce in evidence at this time documents previously identified as E, F, G and H.

(Defendants) Exhibits E, F, G and H, respectively, received in evidence.)

MR. TOPLITZ: I have no questions.

THE COURT: Mr. Yavner, any questions of this

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MR. YAVNER: Yes.

MR. TOPLITZ: Your Honor, excuse me, there were

a few more items I want to cover. It skipped my mind.

When you were receiving these claims and you

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heard testimony about Mr. Greenberg representing Aetna
Casualty & Surety and related to this matter and other
matters and relating to the project in question, did you
receive bills for legal services rendered?

A Yes.

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Q Did you receive a bill dated January 15, 1969?

A Yes.

Q What was the amount of that bill?

A \$12,988.20.

Q Does that bill state for what the services were?

A Yes.

Q What was that for?

A Services \$12,500, disbursements \$488.28.

Q Is there an itemized breakdown of the services rendered?

A Yes.

Q I now show you a check and ask you to identify this check.

A This is our draft No. Mll998360 in the amount of \$12,988.20 made payable to your firm to cover this.

O Did you mention exactly what matter that was involved in, in looking at the letter?

A This is Pabrizio & Martin, Inc.

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Q As to what we were doing, what services and what matter?

- A Legal services in regard to the San Marco.
- Q Was that a claim?
- A Yes.

THE COURT: Legal services with references to what?

THE WITNESS: San Marco, which was one of the claimants.

MR. TOPLITZ: This is the labor-material payment bond, your Honor.\_

THE COURT: Are you planning to introduce that in evidence?

MR. TOPLITZ: Yes.

THE COURT: Have it marked first.

MR. TOPLITZ: I would like this marked for identification.

(Defendant's Exhibit I marked for identification.)

MR. YAVNER: If this is being put in now with the same understanding, simply to show that the bonding company paid a bill of theirs then I have no objection to it. If it is put in as evidence of the correctness of the bill or that it has any -- as a matter of fact, I

Buckmir-direct

withdraw that.

I am going to object to this now on the ground that it is immaterial, irrelevant and incompetent in connection with the counterclaim of the additional defendant.

This is a bill apparently for legal services in a case where the bonding company did not make any payment to the particular claimant under the bond where this is solely for services and not for a payment under the bond and the bond does not refer to legal services in any way.

I don't think that this is relevant, material and competent evidence to justify their counterclaim.

MR.TOPLITZ: Your Honor, as you recall the testimony of Mr. Buckmir, he stated that he received claims from various claimants under labor-material payment bonds and that he had to hire counsel.

This happens to be a bill rendered by our office in defending one of those actions and the reason there was no payment was that we were successful in defending the action for \$112,000.

I say it is very competent because it goes to our counterclaim. Aetna would not have had to incur any of these expenses if the Board had not created a fraud initially.

> SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4500

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MR. YAVNER: Millions of people can start suit against the bonding company and you have to defend them.

MR. TOPLITZ: If we had written a bond we would not be here, would we?

THE COURT: All right, gentlemen, the exhibit will be received in evidence.

(Defendant's Exhibit I received in evidence.)

THE COURT: There is a question as to whether or not the Board has liability in that regard. That is for ultimate decision but it is received, gentlemen.

Q Mr. Buckmir, I show you another letter dated June 28, 1968 and ask you if you have ever seen this letter before and this was attached to the letter.

A Yes.

Q Could you identify that, what that is?

A This is a bill from your firm to us dated June 26, 1968 in the amount of \$20,353.65, of which \$20,000 was for a fee and \$353.65 for disbursements.

MR. TOPLITZ: I would like this marked for identification.

(Defendant's Exhibit J marked for identification.)

Q I show you a draft and ask you if you can identify this draft.

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A Yes, this is our draft No. M10590433 in the amount of \$20,353.65 payable to your firm to cover the bill I just saw.

MR. TOPLITE: Could you attach this as part of Exhibit J, please.

- O I now ask you to tellme in what matter these services were rendered.
- A Fabrizio & Martin, Inc., the matter at hand. These were services dealing with the entire case.
  - Q Up to a stated period of time?
  - A Yes. From March 30, 1966 to April 5, 1968.

MR. TOPLITE: I would like to introduce this at this time.

MR. YAVNER: Objection. This is a bill for legal services in this very litigation and I don't think that that is a proper element of damages.

MR. TOPLITZ: We maintain the argument againTHE COURT: I may agree with you, but I gather
that the claim for damages is by virtue of alleged fraud.

Aetna is alleging that you incur the expenses of payment
bond and also the payment of litigation which they seek
to recover from the Board.

Whether that claim is going to succeed, that is another matter, but they are introduced as evidence to that

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point.

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MR. YAVNER: I withdraw my objection, your

(Defendant's Exhibit J received in evidence.)

I show you a letter dated May 23, 1971, and ask you to identify that.

A This is a letter and bill from your firm to my firm, my company, excuse me, dated May 24, 1971, in the amount of \$500 for fee, \$87.30 for disbursements, total \$587.30.

I now show you a check and ask you if you can identify this.

This is our draft No. M30497713 in the amount of \$587.30 made payable to your firm in payment of this bill which was in connection with the claimant Arrow Louvre Door who had brought a suit against us, under this Fabrizio & Martin matter.

MR. TOPLITZ: I would like to introduce this into evidence.

MR. YAVNER: I assume, your Honor, that your ruling would be the same, that even for legal fees on subcontract claims: on the ground of alleged fraud they would have the right to introduce these payments?

THE COURT: Yes.

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MR. YAVNER: Then I will not make any objection to these.

(Defendant's Exhibits K received in evidence)

MR. TOPLITZ: I have several other documents that

MR. YAVNER: Are they exactly the same, for bills?

MR. TOPLITZ: Yes.

THE COURT: Well, let's try to do that.

we can mark for identification and we can put them in.

MR. TOPLITZ: Give me one minute, your Honor, and I can do all of them.

I would like to introduce into evidence at this time a check and also a bill for legal services in the sum of \$520.

MR. YAVNER: This is the same San Marco where there was no recovery against you folks? You had that dismissed.

MR. TOPLITZ: There are two actions by San Marco.

MR. YAVNER: I have no objection to that .-

MR. TOPLITZ: Here is another one on San Marco.

MR. YAVNER: I have no objection.

(Defendant's Exhibits L and M received in evidence.)

MR. TOPLITZ: I have three bills relating to this matter.

MR. YAVNER: This is all the same type of thing?

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MR. TOPLITZ: Yes, we have the check for two of them but the files indicate payments except for the last one, but it may have come in today, I don't know.

MR. YAVNER: No objection.

MR. TOPLITZ: This is one batch indicating payments of \$12,804.50, \$11,098.84, a payment of \$7,554.02 and as I mentioned before, a bill of \$6,014.35 which may have come in and we may not have put it through our books; in all likelihood it has been paid.

THE COURT: These are legal fees?

MR. TOPLITZ: Yes, your Honor.

(Defendant's Exhibit N received in evidence.)

MR. TOPLITZ: I have these other checks also, Mr. Yavner.

MR. YAVNER: On the assumption that the Court's ruling will be the same as to these checks, I have no objection.

MR. TOPLITZ: One of these items, your Honor, is \$473.07, that is 30 copies of a brief, the expense of a brief. The other item is for a court reporter for \$26.25 to Julius P. Taubman, Court Reporter.

(Defendant's Exhibit O received in evidence.)

MR. TOPLITZ: Your Honor, I had Mr. Trager total these figures this morning because I was not too trustworthy

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in my computations since it was early and the total amount of those checks which I have introduced comes to \$73,237.84.

MR. YAVNER: This is on the legal fees?

MR. TOPLITZ: Yes, just to try to clarify on the record what they total to.

THE COURT: Can we proceed?

MR. YAVNER: I have checked over these and the arithmetic is correct. If counsel represents that this is a recapitulation of the exhibits he has put in, I will accept his statement.

THE COURT: All right.

MR. TOPLITZ: I represent the addition to Mr.Yawner only.

O In those documents which have been previously marked into evidence, Mr. Buckmir, attached to those files were there any other payments for legal fees?

- A Yes.
- Q Could you pull those out to save time?
- A Yes. Here is one right here.

MR. TOPLITZ: I would like to point out to the Court, your Honor, at this time that there is a check annexed to one of the previous records which were marked, Exhibit D, it is a check in the sum of \$308.01 made payable to Max E. Greenberg for legal services.

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If you don't mind, I will pull that off.

MR. YAVNER: I don't understand.

MR. TOPLITZ: We were talking about the checks being attached to the records indicating payments to various lab rematerial people.

MR. YAVNER: You mean you want to add this now to the previous claim instead of leaving it on here? MR. TOPLITZ: Right.

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Q I ask you to identify this check, Mr. Buckmir.

A This is our draft in the amount of \$308.01 made payable to your firm for legal services rendered in handling of the accessory specialties claim. That is under this Fabrizio & Martin situation.

Q Are there any other checks?

A Yes.

Q Would you please identify this draft you just handed me.

THE COURT: Why don't you identify all the checks and in what connection and just put it on the record.

A This is our draft in the amount of \$2078.42 payable to Max E. Greenberg for services rendered in the handling of the claim of Ceco Corporation which was a claim under the bond.

MR. YAVNER: As to all of these checks, your Honor, I have a continuing objection.

THE COURT: I understand that.

A The next one is a draft in the amount of \$971.02 made payable to Max E. Greenberg in connection with his legal representation on the claim of Leonard Adams Company on the Fabrizio case.

The next one is the draft in the amount of \$1324.89 payable to Max E. Creenberg in connection with

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his defense of Korok Corporation, a claim which was made against the bond.

The next one is a draft in the amount of \$2662.87 made payable to Max E. Greenberg in connection with legal services he rendered my company that arose out of the claim of Bradhurst, a claim which is made under the bond. That is it.

THE COURT: Wasn't Bradhurst one of the contractors that was employed to complete the contract?

MR. POWERS: Yes, your Hogor.

THE COURT: How is that liable?

MR. TOPLITZ: Where they made claim under the labor-material bond claiming that they were owed an outstanding balance of money due previous to the termination.

THE COURT: They had been the contractors employed on the job before termination?

MR. POWERS: Yes.

If I may, your Honor, I believe Bradhurst was a contractor for Fabrizio & Martin and Bradhurst had -- I don't recall if it was a time and material contract or a lump sum contract with Fabrizio & Martin. However, in connection with the negotiation of the completion of the word Bradhurst intended that it had performed -- and I don't recall the figures, but we will say it had performed approxi-

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mately \$20,000 worth of work for Fabrizio & Martin and was only paid \$10,000.

And the School Board said that that \$20,000 worth of work that you performed is your problem with Fabrizio and is not our problem. We will just pick up the contract from that juncture. It's that \$10,000 that Bradhurst was not paid. I think the bonding company successfully defended the action.

- I show you these checks and I ask you, on the Bradhurst matter, was the surety company required to make any payment under its payment bond other than for the legal services?
  - No payment. A
  - Do you remember what the amount of the claim was?
  - \$7655. A
- As to these other checks which you mentioned, could you just go through each one of those and see whether it was in litigation or not and what was involved as far as money?
- Korok we successfully defended. I show the claim as \$1890.
  - Let's me the others, too. Q
  - The other three were compromised. A
    - MR. TOPLITZ: At this time I would like to

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introduce these checks together as one batch.

(Defendants' Exhibit P received in

evidence.)

THE COURT: All right.

MR. TOPLITZ: I have no further questions of this witness at this time.

CROSS EXAMINATION

BY MR. YAVNER:

Q May I see the Adams file, plass.

A Yes.

0 There is an Item 2, please.

A That is where it was when I set it up.

O Try to find it, please.

Is that the file you took to take the draft off? A

MR. TOPLITZ: It's one of those.

THE WITNESS: I ripped off the last three but

you ripped off the first two.

MR. TOPLITZ: I will check that.

THE WITNESS: I just had it here and the draft

was on it.

MR. TOPLITZ: I apologize, your Honor, for the There seems to be a file that we just had and delay. now we don't have it.

THE WITNESS: Here it is.

Palmieri and Mr. Powers also participated in that matter,

that is actually how the case came to be settled.

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2	I thought the Court ought to know of that.
3	MR. POWERS: That is correct.
4	MR. TRAGER: I am certain you accept that state-
5	ment.
6	MR. YAVNER: Yes, but I still want to find this
7	other letter in the file.
8	A The answer to the letter Mr. Hynes wrote?
9	Q The letter to which I directed your attention.
10	A No.
11	O You can't find that?
12	A From Fabrizio to me or from
13	Q Whether to the bonding company or to his attorney
14	but in this file is there an answer to that letter?
15	A I can't locate one right now.
16	MR. POWERS: I would like to find out what point
17	Mr. Yavner wants to make on this, because the case was
18	settled in court.
19	THE COURT: He just wants to know if there is an
20	answer in the file to that letter.
21	MR. YAVNER: Your Honor, the additional defendant
22	has offered this as the back-up material to the claim and I
23	offer this in evidence at this time.
24	MUE COURM. What is that?

MR. YAVNER: This is in connection with the

THE COURT: What is that?

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THE COURT: What item is that?

MR. YAVNER: Item No. 2 in the amount of \$9000.

THE COURT: What is the purpose of putting all

that in?

Adams amount.

MR. YAVNER: There is a letter here --

THE COURT: What is the purpose of putting it in?

MR. YAVNER: The purpose of putting it in is to establish two things, one, that this claim may have been paid improperly and, two, I think there are additions here by Fabrizio in connection with this claim.

THE COURT: All right, introduce it.

(Defendants' Exhibit 123 received in

evidence.)

Q May I see the accessory claims?

A Yes.

MR. TOPLITZ: In order to save time, if Mr.

Yavner would give me a list of which ones he is contending
and he wants to put into evidence, I will stipulate to that,
just to move the case along.

THE COURT: You will stipulate to what?

MR. TOPLITZ: If he is going to introduce some of these files claiming that they are inconsistent with the payments and so forth and he wants to introduce the files,

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I will	stipulate	to that.	Just	introduce	the	files	just	to
move ti	he case ald	ong.						

MR. YAVNER: I think that the only one I will take right nowwill be this one.

THE COURT: All right.

O Mr. Buckmir, is this your signature?

A Yes.

Honor.

MR. YAVNER: I offer this in evidence, your

THE COURT: What is that?

Q Would you please identify the document and state its general nature.

A It's a letter dated April 13, 1966, addressed to the Board of Education, Central School District No. 2, Mount Kiske, New York.

Do you want me to read it?

Q That is sufficient at this point.

Is there an attachment to your letter?

A Attached to the letter is a photocopy of an application for contract bond and agreement of indemnity.

FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

MR. YAVNER: I offer this in evidence, your

Honor .

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THE COURT: All right.

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(Defendants' Exhibit 124 received in evidence.)

THE COURT: All right, Mr. Yavner.

I show you the attachment to the letter marked Exhibit 124, and call your attention to a date stamp in the upper righthand corner of the attachment which is headed "Application For Contract Bond.:

What is that date stamp?

- A The date stamp is April, abbreviated, 13, 1964.
- Q Does that indicate the date when you received the application?

A I wouldn't know. I'm not in the bond underwriting department. I can't honestly say what that date stamp refers to.

THE COURT: Is there anyone here from the bond company?

MR. TOPLITZ: No, your Honor. They were here yesterday. Those are the underwriting people.

THE COURT: All right.

Mr. Buckmir, you find out the answer to that question de ' e the recess.

All right, let us move on. We will put in the record whateverthe enswer is.

Q I take it then, Mr. Buckmir, that you have no

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 knowledge about anything in the contents of that attachment? In this attachment to your letter, you have no
knowledge of the fact that it was signed, the date when it
was signed, the date when it was submitted?

A No.

Q And only somebody in the bond underwriting department would know that?

A Yes.

MR. TOPLITZ: Your Honor, I am going to object to this imposition. I put those witnesses on yesterday.

THE COURT: Yes, Mr. Toplitz, but you put the witnesses on yesterday and this evidence was not available yesterday. I gather that this was taken from the files of --

MR. YAVNER: No, no, your Honor, this was not.

MR. TOPLITZ: That was in his possession.

MR. YAVNER: When I found out Mr. Buckmir was coming down, he was the one who had written this latter with this attachment, so I wanted to have it identified properly and I had no idea, one, that he was going to be the last of these witnesses and, two, he would be the only one who didn't know anything about it. It came with his letter.

MR. TRAGER: Your Honor, no matter who signed the letter, the fact is it was the application and the indemnity

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agreement for the bond and all those gentlemen here yesterday were bond underwriters and supervisors and in charge of the whole entire thing and he could have introduced it at that time.

THE COURT: I don't think you are under any great imposition. As I understand it, one of the parties who was here yesterday has an office on Williams Street, so he can easily be secured.

All right, let us move on.

MR. YAVNER: I have no further questions of this witness, your Honor.

MR. TOPLITZ: Excuse me, your Honor, to straighten this out ---

THE COURT: All right, let us move on.

MR. YAVNER: I have no further questions of this witness.

THE COURT: Is there anything further of this witness, Mr. Top' tz?

MR. TOPLITZ: No, your Honor.

(Witness excused.)

THE COURT: Call your next witness, please.

MR. TOPLITZ: Your Honor, I only have one more witness and I mentioned that would be Mr. Fabrizio, and at the time he takes the stand by Mr. Powers I would then

just ask him a couple of questions to avoid bringing him on and back. I only have two or three questions.

THE COURT: All right. Then, except for that, the additional defendant rests, is that correct?

MR. TOPLITZ: Yes, your Honor, except for that.

THE COURT: Mr. Powers, let us go on.

MR. TRAGER: Your Honor, I don't think Mr. Yavner has closed his case yet.

THE COURT: Mr. Yavner has closed his case.

MR. TRAGER: Mr. Yavner has closed his case?

ment he had was that he was to submit his witness yesterday and if he didn't submit this witness he closed his case.

Let us go, Mr. Powers, let us move. This case has taken far too long.

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OLIVER KIRCHOFF, called as a witness on behalf of the plaintiff, being first duly

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sworn, testified as follows:

MR. POWERS: If your Honor pleases, Mr. Kirchoff has trouble hearing, so I may be talking a little louder than normal.

DIRECT EXAMINATION

BY MR. POWERS:

Q Can you hear me, Mr. Kirchoff?

Just about.

THE COURT: I am sure with the acoustics in this room that the reporters would appreciate that from all of us.

- Mr. Kirchoff, by whom are you presently employed?
  - F.D. Rich Company, Stamford, Connecticut. A
  - What line of business are they in? 0
  - Construction. A
  - How long have you been so employed?
  - With F.D. Rich? A
  - Yes.
  - 1 Seven years.
  - In what capacity? 0
  - Construction supervisor. A

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were the same as you had previously stated, supervise the work and interpret plans and specifications?

A Right.

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- I show you these two folders, Mr. Kirchoff, and ask you what they are, please?
  - A These are copies of my daily reports.
- Q You prepare daily reports? What do you mean by a daily report?

A Well, temperature of the day, weather conditions, contractors on the job, who they have working for them, the quantity of men and what they are doing.

- O So it is basically, then, a chronology of the job by day?
  - A That's right.
  - Q Did you prepare these daily reports?
  - A Yes.

MR. POWERS: I would like to offer them in evidence.

There is a period of about two weeks in there that I was in the hospital that I didn't make the reports out.

MR. YAVNER: No objection.

MR. POWERS: There are two folders and we can possibly mark them A and B, if you like.

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(Plaintiff's Exhibits 32-A and 32-B, respectively, received in evidence.)

I show you two additional folders, Mr. Kirchoff, and ask you if you can identify them, please?

A These are daily time sheets of the men who were on the job, what their trade was, that is, the men that were working for Fabrizio & Martin, what their trade was and the amount of hours they put in per day and what they are working on.

THE COURT: What is the purpose of this?

MR. POWERS: Your Honor, in connection with the claims for payment that Fabrizio & Martin is seeking against the School Board, reference will be made to these documents.

MR. YAVNER: May I object. This was not a time and material contract with Fabrizio & Martin, it was a lump sum.

MR. POWERS: I am not talking about time and material, I am saying in connection with the claims that are being presented these documents will be pertinent.

THE COURT: All right.

Q And did you prepare these reports or were they prepared at your request?

No, I prepared them personally.

MR. POWERS: I would like to mark these as the

Kirchoff-direct

next exhibit in svidence, please.

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MR. YAVNER: Your Honor, it seems to me that most that can be done with this reference is subject to connection, because on its face these are time sheets for men or alleged time sheets for men kept by Mr. Kirchoff and Fabrizio's contract was a lump-sum contract and any claims that it has are in connection with the lump-sum contract.

made by the plaintiff in this case is the fact that it was

required to maintain a master mechanic on the job which it

contends was not part of its obligation. These time sheets

show that there was a master mechanic on the job during the

THE COURT: All right, I will receive them.

(Plaintiff's Exhibit 33-A and 33-B, respectively,

period involved and the master mechanic is listed, among

others, on these documents. Also there are other items

involved on these time sheets that are relevant.

received in evidence.)

MR. POWERS: Your Honor, one of the claims being

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Mr. Kirchoff, do you recall that Fabrizic &
Martin was required to perform certain concrete and
excavation work for electric manholes?

A Yes.

And was it the contention of Fabrizio & Martin that the work involved in connection with these electric

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manholes were not part of its contract but were part of the contract of one of the other contractors?

- "lat's right.
- I show you this sheet of paper entitled "Concrete Excavation For Electric Manholes and Concrete Encasements" and ask you if you have seen that document. previously?
  - I'd say partially yes and partially no.
- Have you seen the document? Have you seen that document previously, that piece of paper?
  - That's right. I'm looking at it. A
  - And you have seen that before?
  - Yes.

MR. YAVNER: If your Honor please, the witness testified a moment ago partially --

THE WITNESS: You have to speak a little bit louder.

MR. YAVNER: The witness testified partially yes and partially no. Mr. Powers repeated his question in a certain manner and I am not sure what the witness's answer is now as to whether he has seen that document fully before or partially yes and partially no.

MR. POWERS: I think it is quite obvious that the witness had misunderstood the question, because he

either saw it or didn't see it, and I think it was just a misunderstanding.

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THE COURT: Will you answer the question, please?

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THE WITNESS: Sir?

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THE COURT: Would you answer the question, please.

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Have you seen that document before?

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THE WITNESS: Yes.

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THE COURT: What did you mean when you said partially yes and partially no?

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THE WITNESS: When I say partially, I say there is a question here as part of this I consider as an extra and part of it is not.

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MR. POWERS: That is what I thought he meant, your Honor, and that was the purpose of the question.

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THE COURT: All right.

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Q Could you specify generally what the items are on that sheet of paper and what they consist of, what this extra claim consists of?

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A Well, going down from the top on the concrete
manholes for the electrical service from the old school or
the existing school to the new one, it is a manhole -- the
forms for the concrete walls of the manholes, the slabs over
the manholes and the base of the manholes.

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belong in there as being extra work.

A That's right.

Q Could you specify which items are proper items and give the dollar value of those items?

A The concrete walls for the manholes, \$1044, --do you want the unit breakdown and all?

Q No.

A Just the total amount?

Q Right.

The concrete slabs for the manholes, \$946.

The forms for the walls of the manholes, \$1918.

The forms for the slabs, \$288.

The common brick for the tops of the manholes and the installation -- well, that was \$275.

The installation of the covers and the frames, \$560.

The next item is -- it is hard to explain.

The drawing showed a concrete encasement of four fibre ducts for the electrical service. The electrical contractor was issued a contract to put two additional ducts in this area, therefore, enlarging the concrete encasement by one-third. This item, this concrete encasement and the excavation for it, should be altered.

Q You mean as the amounts stand in that document,

Kirchoff-direct

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Then it goes into the trench excavation, hand excavation, trench backfill, hand backfill, common brick, install coffers and frames, concrete encasement for the duct work, the wood forms, trench excavation and trench fill for these items.

- Does that document specify either cubic yards or number of items pertaining to each particular classification?
  - A Yes, it does.
- Q Do you know whether those amounts are accurate amounts?
  - A That's right.
- Q You said you have reviewed this document previously.
  - A Right.
- Q Is it your contention that all of the items contained on that sheet of paper are properly extra work to your contract?
  - A No.
  - Q Let me ask you this:

What is the total amount daimed in that document that you have as it exists?

- As it is here with overhead and profit, \$17,855.84.
- Q You testified that certain items do not properly

they are incorrect, they are too high?

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A That's correct, they are incorrect.

0 And you have reduced them?

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Sir?

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Have you reduced them?

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Yes. Well, the duct area I've reduced from 193 A

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yards to 22 yards and changed the \$6755 to \$830.

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not be legitimate here. In other words, we don't claim any-

The wood forms would remain the same, but it would

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thing for the wood forms because it is just a matter of

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spreading them out. We do claim additional excavation.

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The tranch excavation was \$964, reduced to \$38.30, and the

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treach backfill from \$275.50 to \$11.

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Cutting and patching of the pavement we were entitled to, repair of the lawns we were entitled to,

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cutting and patching of \$500 and repair of the lawn \$330.

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What is the total amount being claimed under

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\$7773.36.

this ravision that you have made?

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And the reason for this revision is that the

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contract documents originally provided for four ducts and there was just an additional two ducts that had to be taken

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Correct.

into consideration?

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### Kirchoff-direct

Q And the claim as originally prepared was for the total, excavation and so forth, for the six ducts?

A Correct.

MR. YAVNER: I am trying to make the objection that this is a leading question in which the question has summarized the whole answer.

THE COURT: The whole examination has been leading.

MR. YAVNER: I withdraw my objection to it.

THE COURT: All right.

MR. POWERS: I would like to offer this in evidence. Your Honor, there has been no objection to it and I think this will be Plaintiff's Exhibit 34.

(Plaintiff's Exhibit No. 34was received in evidence.)

Q Mr. Kirchoff, was Fabrizio & Martin required to perform work in connection with w water tank or a water reservoir?

A Yes.

Q And was all of the work performed in connection with that water tank or reservoir part of the Fabrizio & Martin obligation?

A Yes.

Q Was there any extra work performed in connection

1	gtg 2 Kirchoff-direct
2	with the water reservoir?
3	A Yes.
4	Q I show you this letter of Fabrizio & Martin to the
5	architect, dated June 7, 1965, and ask you if you can
6	identify it, please.
7	A Yes, it is a request for change order for addi-
8	tional moneys regarding changes to the water tank and sur-
9	rounding area of piping involved with it.
10	Q And how much of a change is requested, the dollar
11	amount?
12	A What I see here is one typed and one written.
13	Q I'msorry, the typed amount.
14	A \$11,433.52.
15	Q And could you tell me, please, the circumstances
16	surrounding the contention of Fabrizio & Martin that this
17	was extra work?
18	A The reasons why?
19	Q Yes.
20	A There is a detail in the specifications giving
21	the size of the water tank. We were authorized by the
22	clerk of the works at that time to start work on the water
23	tank.
24	O If I may interrupt you at this juncture, I show
25	you this note of 10/8/64, and ask you if you can identify

that note.

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Kirchoff-direct

Right. This is the notice by Frank Adams, who was

the clerk of the works on the job. authorizing me to go start work on the water tank, which is up quite a distance

away from the project and on top of a mountain, you might call it.

This needs special equipment to get up -- crawlers to get up to the top of the mountain to do the excavation.

We started to excavate the tank and when we put the base in I was told that the tank was going to be changed in dimension and there were going to be revisions to the piping.

I had to pull a truck with the patented forms up on the hill prior to this verbal stop order and the forms were left there. We had excavated, as I say, and put the hase down for the tank and then I was told to stop.

I don't remember the exact dates, but there was approximately four months involved which went through the winter time that we never received any order to proceed.

Due to the rains and snow and the freezing and so forth, this excavation partially back-filled. Also the form material that was up on this hill had to stay there waiting because we were expecting daily to receive proceed orders on the revised tank and we didn't.

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piping.

When we finally received a revised drawing for the tank, there was an additional manhole on the top of the tank, and there was an additional manhole on the side of the tank, and there were quite a bit of revisions to the

Then I guess that is when Mr. Fabrizio requested the change order.

Because of this additional piping and manhole?

The thing had to be, I wouldn't say, 100 per cent excavated, but it was all sand up on the top and a lot of it had washed in and covered over the slab which we had previously poured, plus the fact that we had to dig down and put this manhole base in plus the manhole and this additional trenching for piping that was not shown on the original drawings.

MR. POWERS: I would like to offer this letter of June 7, 1965, as the next exhibit, please.

THE COURT: As I understand the status of your claim, you can't contend that you are entitled to any quantum meriut for any work done, the best that your contention would be, as I understand it, is for value of whatever the Board has received.

It, therefore, appears to me that you are putting in evidence here claims for additional work which is going

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Kirchoff-direct

at the matter, I think, quite incorrectly.

My own view is if you are entitled to any claim over and above what you have received that you have to show that value of what the Board obtained is in excess, that is, part of the school and the tank and so forth that you delivered to them, that its worth is in excess of the two million or whatever they paid you.

I am at a loss now as to why all this documentation is going in, because it does not seem to me that this in any way meets that claim whatsoever.

MR. POWERS: Your Honor, I don't know what could be more meaningful as far as substantiating the claim of the plaintiff here in that this represents extra work that was performed by Fabrizio & Martin which was not part of its original contract documents.

This work was performed --

THE COURT: But you are not entitled to receive it. You are now arguing quantum meriut.

MR. POWERS: Value, and this represents part of the value that the school got.

on that basis, you have to argue value on whatever structure you left the school, not in terms of the work that was done in it. You can't place value on that.

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#### Kirchoff-direct

You gave the school a building and as far as I understand the law that would govern this situation to be, you are arguing quantum meriut. I understand the law of New York and the case that is supposed to be controlling here, which is you can't receive quantum meriut in regard for services done, the worth of services that you have performed.

MR. POWERS: Your Honor, I am not seeking quantum meriut, I am seeking to offset whatever claim the School Board may have with respect to its claims against me.

Favrizio & Martin, the plaintiff, gave the school a certain amount of school, the School Board paid for a certain portion of what was given.

What I am putting in here is that portion of the school that was given to the School Board but it never paid for. It represents part of the value of the school as given to the School Board by Fabrizio & Martin.

THE COURT: I'm sorry, I don't agree with that.

I don't agree that that is what you are doing.

If you are doing that, then what you should be putting in is not what the services that this man did, but the value of the structure given to the School Board. You are not doing that at all.

I don't believe this is proper in any way.

MR. POWERS: Your Honor, maybe it would be different if I asked the witness if he considered this to be the fair and reasonable value of the work that was performed.

THE COURT: But that is not it.

MR. POWERS: I really am --

THE COURT: I don't understand how I can explain it any more. I don't believe that the School Board, as to the law of New York as I understand it, that the School Board is now with this sort of contract that you can come in and say to them that, "We performed a certain amount of work and even though we don't have a contract, the contract is illegal, we are supposed to get money for on the basis of what the value of those services were."

The only thing you can tell the School Board is,

"We gave you a structure. Whatever the value of that

structure is, the value of that is-- since you have re
ceived that and kept that, that the value of that structure

is the thing that we are entitled to receive, and if that

is over two million, one hundred thousand dollars or what
ever, then I think that you are entitled to claim what is

more than that.

If the situation is otherwise, then the case that is cited as authority here, controlling here, has no meaning.

MR. POWERS: If I may, your Honor, and just as a point of clarification, could your Honor explain to me how what I am doing now is any different than the testimony that was put in by the School Board with respect to completion costs? The completion cost the Court accepted for what it was worth, at least admitted the evidence, and the documentation for whatever it was worth, and that is no different than what I am doing in showing value of what the School Board received.

THE COURT: No, it is quite different. The School Board has indicated that it cost them a certain amount of money to complete the building and they would offset that against the theory and the equities in the case against the value of the building that they received.

But what you are doing is you are not giving us the value of the building, you are giving us the value of the services performed, which, in essence, as far as I can understand, quantum meriut argument, and as I understand New York law you can't recover under that.

MR. POWERS: I cannot make affirmative recovery, but that does not mean I cannot use it defensively as a setoff, your Honor, and that is all I am doing it for, as a set-off, not as an affirmative.

I am looking, I know, I realize I cannot get dollars from the School Board.

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Kirchoff-direct

THE COURT: I don't believe that this evidence is appropriate. I don't believe that you can offset this in any way at all.

MR. POWERS: As I say, I am just trying to clarify in my own mind what I can put in as far as your Honor is concerned and then I take it the only thing that I could put in, really, is an expert coming in and saying, I appraise the value of what you gave as x number of dollars; that's all?

THE COURT: That is correct.

MR. POWERS: What about the cost to Pabrizio, what it cost him to perform the work?

THE COURT: What it cost him to perform the work, as I understand it, that is what I understand the New York Court of Appeals to day, that we are not allowing this because if we get that kind of argument then all that it would mean is that we would be countenancing school authorities and contractors going beyond the law to not submit contracts for public competition and then they would say, well, it does not matter in any way, we will get value for services performed, and that is what I understand the law of New York to be.

MR. TRAGER: Your Honor, may I be heard since the underlying equities are involved here?

Yes.

THE COURT:

MR. TRAGER: Your Honor, in the supplemental amended interrogatories that were introduced into evidence and the testimony that Dr. Powler gave with respect to how he arrived at the net balance due for the completion expenses of \$165,000, the School Board used as a basis, and I believe the record will bear it out, \$2,641,000 some odd as being the Fabrizio contract with authorized changes and extras.

They also introduced into evidence, and it is part of the record, that there were some pending change orders which they didn't decide on and had not decided on—either they were going to reject them or what.

It is only by taking into consideration all of these extras that were performed that you can arrive at a correct figure as to what is to be credited to the Fabrizio & Martin contract to arrive at a net figure of the \$165,000.

If you don't permit this line of testimony, the \$165,000 should not be accepted either.

THE COURT: I don't agree with that. I think--

MR. TRAGER: Your Honor, I think---

THE COURT: I think they are two entirely different bases for both of those.

MR. TRAGER: But the 165 was only arrived at

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Kirchoff-direct

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through identifying the \$2,541,000.

Is that not conceded?

THE COURT: What the School Board is saying is that they are off-setting cost in regard to cost to them, money that they actually paid out for a building in regard to this against what would be the value of the building in terms of this.

This is the only way that I can understand the law to be.

They can talk in terms of cost, but when a contractor talks in terms of performance of services and he goes outside the contract and he says in terms of the labor and so forth that he has done this and he is entitled to, he is talking quantum meriut, because he wants a return for the value of his services, which, as I understand New York law, he cannot receive under this kind of arrangement.

The School Board obviously can offset costs to them against value received in order to establish what the equities actually are.

MR. TRAGER: But, your Honor, it has got to go both ways. In order to arrive at the cost they say the contract with extras and authorizations was \$2,641,000.

THE COURT: All right, they said that.

MR. TRAGER: At the time they arrived at that

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## Kirchoff-direct

figure they had other change orders pending. Now, that, too--

THE COURT: I understood Dr. Fowler to say that all of the change orders that had been approved by the architect were included in that \$2,641,000 figure.

MR. POWERS: Yes, but Mr. Crane testified that there were other items and it was just a question of determining the dollar value.

There was no question about the fact that Fabrizio & Martin was entitled to be paid, the question was how much was he to be paid.

At this juncture, Fabrizio & Martin is being penalized because the School Board and its architect never did approve threse and, as a result, threatened to walk off the job, and now Fabrizio & Martin is being penalized because of the failure of the architect and the School Board to act on these claims that had been presented.

In addition, your Honor, in that Gerzof against Sweeney situation, the Court of Appeals in New York looked to the full contract price for the new generator under the second bidding. They use that figure, the actual cost and the actual contract price for the second contract and used that figure in determining the amount of damages that may have been sustained by the town.

Here, again, you look to the full value of the work:

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that was performed --

Kirchoff-direct

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THE COURT: I don't believe that. I am not persuaded suaded that that is how you get a value. I am not persuaded by this at all.

Since I am not persuaded, your contending that it is critical to your case, I would suggest that you address yourself to that in your post-trial briefs.

I will allow you to continue with this evidence, but I am giving you clear warning that in my judgment this is irrelevant and unless I am convinced to the contrary, I will not consider it.

All right, let us proceed.

(Plaintiff's Exhibit 35 received in evidence.)

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Kirchoff-direct

0 With respect to Plaintiff's Exhibit 35, Mr. Kirchoff, I refer you to one item on page 2 of that exhibit which is a manhole, 13 inches high, in which a claim for \$650 is requested, is that correct?

A 13 feet high.

0 I'm sorry.

A Right.

Is it not a fact that that item was paid in a change 0 order, that \$650, change order 14?

A That is right.

So therefore is your claim reduced on this item from \$11,433.52 to \$10,773.74?

A Right.

Mr. Kirchoff, I show you this letter of July 29, 1965, and ask you if you can identify it, please.

It is again a request from Fabrizio & Martin for a change order.

0 For what?

Regarding the water tank. This is the extra equipment going up there and re-excavating around the tank due to the fact that we were held up for approximately from four to five months and again I would say over the winter and the sand had washed back in and then there was some hand excavation for labor to excavate the additional piping and so forth.

## Kirchoff-direct

that this is a waste of time, my suggestion for the way for you to get this in is make an offer of proof and we can get all of it into the record, and I am not convinced that it is appropriate and I am therefore not going to be here listening to this.

It seems to me you can get it in by an offer of proof.

MR. POWERS: If I could not get it in that way I would have asked for a mistrial, to be perfectly frank, your Honor. I feel that strongly about it that these are items that can be balanced off.

I can appreciate your Honor's position.

THE COURT: We both feel strongly about it.

MR. POWERS: I can realize that.

THE COURT: Why don't we do it that way?

MR. POWERS: Might we are the luncheon break then and I will make my offer with the explanation for the offer then?

THE COURT: That is a good idea.

We will resume at a quarter of two.

(Luncheon recess.)

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#### Buckmir-cross

### AFTERNOON SESSION

1:45 p.m.

MR. TRAGER: Pursuant to your Honor's request Mr. Buckmir has called Connecticut in answer to your question.

MR. TOPLITZ: Does your Honor want him to take the stand or you want us to tell you the day?

THE COURT: Mr. Yavner had asked the question. I had assumed, although that was a dangerous assumption, that the question was for some purpose and he might want to follow it up. I don't know.

MR. YAVNER: I want to follow it up with a qualified witness. I thought Mr. : buckmir said he knows nothing about this. If he does, I will ask him some questions and we will find out.

MICHAEL J. BUCKMIR, resumed: CROSS EXAMINATION (continued) BY MR. YAVNER:

Mr. Buckmir, I show you Exhibit 124 and direct your attention to the document entitled Application for contract bond and agreement of indemnity.

Is not that dated April 13, 1964?

Yes. Λ

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Buckmir-cross

Q And does that indicate the date when the application for the bond was made?

A No, in accordance with the Judge's instructions

I called Hartford Bond Underwriting and was informed that
that date stamp represents the date that the original of
this document was received in the Hartford branch underwriting department.

- Q And when was it received by any branch of Aetna?
- A That was the date it was received by the Hartford branch underwriting department.
- O My question is this. Assuming that is the date received by the Hartford branch this bond was issued by the New York office, was it not?
- A I had nothing to do with the issuance of the bond.
- Q Did the information that you get as a result of your telephone call a few minutes ago let you know--

THE COURT: I believe that that testimony was gone into yesterday. The underwriters from Connecticut indicated that they had written the bond and they processed it in New York and it had to be signed by someone in the New York office.

I assume they were going on with the bond in Connecticut because Mr. Fabrizio was at that time a

Qg 3

# Buckmir-cross /redirect

Connecticut corporation.

MR. TOPLITZ: Yes, your Honor.

Q I direct your attention to the bottom of this application where there is the heading "Names and locations of bidders and amount of base bid" and it starts with the word "Applicant."

Are there any entries in there?

A No.

MR. TOPLITZ: The document is in evidence and it speaks for itself.

THE COURT: Yes.

MR. YAVNER: Thank you, Mr. Buckmir.

#### REDIRECT EXAMINATION

#### BY MR. TOPLITZ:

- Q I ask you to look at this document and tell me the date this document was executed.
  - A March 17, 1964.
  - Q Does it indicate who signed that document?
  - A Vincent Fabrizio, president of Fabrizio & Martin,

#### Inc.

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- Q Who was it witnessed by?
- A James Fabrizio.

MR. TOPLITZ: That's all.

THE COURT: You are excused.

THE COURT: Let's get to your offer of proof,
Mr. Powers.

MR. TOPLITZ: Can I excuse Mr. Buckmir?

THE WITNESS: I thought he was from New York.

Quite frankly, I will be happy when you tell me that you want to excuse all the witnesses.

MR. POWERS: I was wishing the luncheon break would be longer, your Honor, but in connection with the offer of proof I will try not to allude to anything that was discussed prior to the luncheon break.

I think probably one of the main reasons for permitting this evidence as to items of work performed by Fabrizio & Martin for which it did not receive payment is the fact that Fabrizio & Martin has submitted to the Court an addition to the pretrial order which includes a seventh and eighth cause of action.

The seventh cause of action is, I think, somewhat identical to what was alluded to earlier today by Aetna as its cause of action against the School Board for fraud.

Fabrizio & Martin, by its addition to the pretrial order, seeks to recover from the School Board damages in the sum of \$708,000 plus for the misrepresentation and fraud of the School Board in the manner in which it handled the issuance of the change order that was signed

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and executed on the same day as the contract, namely, November 17, 1964.

It is the contention of Fabrizio & Martin that representatives of the School Board informed Fabrizio & Martin that the signing of this change order and that the changing of the work was not illegal and was permitted under the laws of New York.

Fabrizio & Martin was a Connecticut contractor.

I will introduce evidence to this effect. They had never performed work in the State of New York previous to this contract.

It was not represented by counsel at any time during the negotiations or at the signing of the contract or any time shortly thereafter.

Our firm was not brought into the case until,

I think it was the fall of 1964, if not later. We were

brought in as first counsel representing Fabrizio & Martin
in connection with this contract at least six months or so
after the contract was signed and work started to commence.

It is also submitted, your Honor, that there are certain items of work that cannot be evaluated by an appraisal of the school. Obviously an appraisar can come in and look at the building and say "Yes, I can put a value on this building as being x number of dollars."

But he cannot put a value just looking at the school as it existed on the day in question, he cannot put a value on materials, say, the use of the borrow pit.

Whether Fabrizio & Martin was required to use the borrow pit for fill or was required to leave the site for fill, an appraisal of the building could not possibly bring this out by mere inspection.

The same is true with respect to other items of claims by Fabrizio & Martin in which they claim that they were required to do work outside the scope of their contract and work that was required to be performed under the original contract documents by the other prime contractors, namely the mechanical prime contractors.

Fabrizio & Martin was required -- and I think there was there was testimony this morning by Mr.Kirchoff -- to install and do excavation in connection with certain man-holes and other items.

The fact that those manholes were installed does not change the value of the school. But it does change the amount of work that Fabrizio & Martin performed in connection with the school and whether it was its responsibility initially to perform that work.

One other item I think I have, your Honor, and that is with respect to change orders 15 and 16.

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As the record now stands, change orders 15 and 16 are used by the School Board in determining the completion costs.

However, change orders 15 and 16, at the beginning of this trial, were not included, the reason being that the School Board had not approved those two change orders.

If those two change orders are properly part of this case then I don't see why any of the other work performed by Pabrizio & Martin should not be part of this case.

It is the same situation. Here are two change orders that represent work that was not approved by the School Board at the termination of Fabrizio & Martin's contract.

The claims that I attempt to introduce are also items of work that were not approved by the School Board at the termination of Fabrixio & Martin's contract.

THE COURT: Mr. Powers, I don't think you are going to convince me on that.

What I meant to suggest to you, in order to protect your record, was not that you make an argument but when I suggested that you have a right, as you well know, under the Federal Rules, if evidence is ruled inadmissible to make an offer of proof as to what those documents are and what they purport to show.

I am giving you that opportunity to do that right

I am giving you that opportunity to do that right now.

MR. POWERS: I shall do it. That was a prelude to my offer. I'm sorry.

I think the first two items of proof have already been marked in evidence and I will not discuss them further.

The next item is an item for \$1900 for the truck-ing, spreading of topsoil and seeding, approximately 11,200 square feet of area.

This work was performed in connection with a change order authorized by the School Board for the total sum or the total claim being presented to the School Board of \$6.178.97.

The School Board paid the difference between the \$1900 and that \$6,178.97 so there still is a claim for the topsoil of the \$1900 and also there was additional work in connection with this same item and I should say that the change order involved was change order No.12 and it involved work performed at the west area of the track

There is an additional item of cost contained in a letter of January 6, 1966 for additional \$252 for the use of one loader for eight hours at \$28.12-1/2 plus 12

THE COURT: If you have any documents that are a part of the offer of proof, I think that you should submit them as far as your offer of proof and have them identified.

Then you will have the whole thing in and your record will be protected.

MR. POWERS: The first letter dealing with the \$1900 is a letter of September 24, 1965 from Fabrizio & Martin to the architect requesting a change order.

THE COURT: That would be marked as Plaintiff's Exhibit what?

MR. POWERS: 36.

per centoverhead and profit.

(Plaintiff's Exhibit 36 marked for identification.)

MR. POWERS: Change order 12 is already in evidence.

The second item for \$252 is a letter dated January 6, 1966.

(Plaintiff's Exhibit 37 marked for identification.)

MR. POWERS: The next item, your Honor, deals with the extra work performed in connection with the sanitary system. Fabrizio & Martin has taken the position

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that under the terms and provisions of its contract the sanitary system which is covered by Division 24 of the contract specifications was to be performed by the plumbing

contractor and not by the general contractor.

The general contractor -- well, I should say the contractor for general construction and site work, namely, Fabrizio & Martin.

There was an additional work of installing manholes and sanitary lines and excavation and backfilling in connection with that work and the total value being \$18,244.52.

I respectfully request that this undated itemisation be marked as the next exhibit for identification.

(Plaintiff's Exhibit 38 marked for identification.)

MR. POWERS: The next item deals with work performed in connection with the water supply system, namely, additional work for excavation, back-filling and layout of certain water supply lines.

Again it is the position of Fabrizio & Martin that this work was not part of its work under the plans and specifications and, as a matter of fact, addendum No.2 to the plans and specifications specificatly excludes this work, or I should say, specifically includes this work in

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the plumbing contractor's contract.

and the claim is represented by a letter of September 28, 1964, from Fabrizio & Martin to the architect and also a summary entitled, undated summary, entitled Water Supply which indicates the exact work performed and the dollar value for each item of work coming to a total of \$9,070.32 and I request that this letter and summary be marked as the next item for identification.

(Plaintiff's Exhibit 39 marked for identification.)

MR. POWERS: I might say with respect to all of these items that I have produced and those that I am about to produce, if testimony were heard with respect to them, the testimony would be that the dollar figures represented in these items are a true and a fair value.

THE COURT: That would be testified to by who?

MR. POWERS: Mr. Kirchoff, your Honor.

THE COURT: Go ahead.

MR. POWERS: The next item of work deals with a request for an extra for supplying a master mechanic to the project.

It is the position of the plaintiff that a review of the contract documents indicates a list of all of the

laborers required to perform work on the project with the minimum wage to be paid to each type of laborer.

There is no indication on that list that a master mechanic is required or would be required in connection with the performance of work.

However, a master mechanic was required.

at this juncture to the effect that in the completion contract a question was asked at the pre-bid conference as to whether the prime contractor for the completion work would be required to supply a master mechanic and the answer was no, the School Board would supply him.

of proof, not arguing. Make your offer of proof and what you think it will show.

MR. POWERS: I therefore offer a letter of June 15, 1964, from Pabrizio & Martin to the architect requesting an extra for the master mechanic together with a handwritten claim indicating the weeks during which a master mechanic was employed on the job, the cost per week for the mechanic for a total claim of \$14,248.50.

I might add, your Honor, with respect to the weeks during which the master mechanic was employed on the project Plaintiff's Exhibit 33 -- which is a breakdown of

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labor- the weeks during which such a mechanic was employed.

(Plaintiff's Exhibit 40 marked for identifica-

tion.)

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MR. POWERS: The next item is an item for extra overhead and profit on rock.

Change order 5 was issued by the School Board for an additional amount to be paid to Fabrizio & Martin for additional rock that was found on the project site and exceeded the allowance of \$54,000 as provided for in the original contract documents.

The total dollar value of the rock, according to the School Board provided for in change order 5 is \$113,233.40.

In that regard the School Board allowed am item of profit for 6 per cent.

It is respectfully submitted-- well, the contract documents provide for overhead and profit at the amount of 18 per cent, 12 per cent for the subcontractor performing the work, I believe, and 6 per cent for the prime contractor.

rock provided for, not the original rock provided that was contained in the contract documents, of \$54,000, taking just the change orders for extra rock over and above that amount, which is \$59,233.40, the School Board allowed 6 per

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or a sum of \$3,554.

It is the contention of Pabrizio & Martin that the facts show that if 18 per cent were allowed the total overhead and profit would be \$10,662.01 and subtracting from that the overhead and profit that was allowed of \$3,551, you come up with a claim of \$7,108.-1.

In connection therewith, I offer a letter from

Fabrizio & Martin to the architect, dated May 11, 1965,

with a copy of change order 5 annexed thereto and request

that this be marked as the next exhibit for identification.

(Plaintiff's Exhibit 41 marked for identification.)

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MR. POWERS: The next item of proof, your Honor, deals with the borrow pit. Change order 1 in the contract, which is the change order that Judge McLean found made the contract illegal, provides that the contractor, namely the contractor for general construction and site work, will take fill from the borrow pit designated.

If unsatisfactory fill was found in that borrow pit there is provision in change order 1 for the School Board paying the contractor for obtaining the fill off site.

If permitted to introduce evidence, the evidence would be that the material in the borrow pit was not satisfactory, that there was a steady and of water that flowed from this borrow pit making it unsatisfactory for fill in that the fill had to have only a certain moisture content and the material that was in this borrow pit had a moisture content far in excess of the moisture content actually in this material.

As a result, Fabrizio & Martin, not being allowed or given a change order authorizing it to purchase fill outside of the site, off site, used the borrow pit as directed by the architect and in connection therewith had to use a number of items or, rather, a number of pieces of equipment and additional labor to dry out this borrow pit material before it would be used as fill.

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There was additional handling and so forth. The amount of fill involved is quite extensive and, again, in connection with this, the items of equipment that were used in obtaining this fill from the borrow pit are contained in the daily reports that have been marked as Plaintiff's Exhibit 32-B. These are the daily reports that Mr. Kirchoff referred to earlier. These daily reports indicate the specific items of equipment that were used in the borrow pit for the obtaining of this fill and also it's the contention of the plaintiff, and Mr. Kirchoff will testify, that if the fill were proper and because of the fill not being proper and if Fabrizio & Martin were permitted to purchase the fill off site at the expense or the School Board as it was subsequently permitted to do on a certain change order in approximately November 10, 1965, that it would not have had to use these various items of equipment and that it would only need one dozer, in effect, in the area where the fill was being spread. The total amount of this claim is \$113,060.

I offer in connection with this seven handwritten sheets, yellow paper, indicating the date on
which equipment was in the borrow pit, the number of items
of equipment in the pit, the type of equipment in the pit,
and also indicating the cost of the various items, the

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cost to rent these various items of equipment and this together with Exhibit 32-B would substantiate the exact dates during which the borrow pit was in use.

I respectfully request that these yellow sheets be marked as the next exhibit for identification.

(Plaintiff's Exhibit 42 marked for identification.)

MR. POWERS: The next item refers to progress photographs that Fabrizio & Martin was required to furnish to the School Board. The proof on this item would be that there is no provision in the contract documents requiring Fabrizio & Martin to furnish progress photographs. There is a provision that progress photographs are required but they are not made the obligation of Fabrizio & Martin nor are they made the obligation of any of the other prime contractors.

The contention and the proof would be that by reason thereof the School Board had no right to charge the full amount of progress photographs to Fabrizio & Martin but that the amount should have been shared between all four prime contractors. In connection therewith I submit a letter of May 14, 1965, from Fabrizio & Martin to the architect together with a breakdown of costs for a total of \$1144.80.

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I request that that be marked as the next exhibit for identification.

(Plaintiff's Exhibit 43 marked for identification.)

MR. POWERS: The next item or claim is a claim for excavation that was required to be performed by Fabrizio & Martin and the total sum of this claim is \$51.41, and it is backed up by a time slip signed by the clark of the works for the School Board.

I, therefore, introduce as the next exhibit for identification a letter from Fabrizio & Martin to the architect dated November 10, 1965, giving a breakdown of the costs involved together with this attached daily time sheet which has been signed by the clerk of the works for the School Board.

(Plaintiff's Exhibit 44 marked for identification.)

MR. POWERS: The next item is covered in a letter of February 23, 1966, from Pabrizio & Martin to the architect and it covers the cost of accomplishing the vertical drop in the three bays in the acoustical ceiling.

The total amount of this claim as itemized in this letter is \$588.40.

This work was not part of Fabrizio & Martin's

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contract. The evidence would indicate that this work was not part of Fabrizio & Martin's contract and that the work was requested by the architect and a change order had not been issued as of the termination. I request that that letter be marked as the next exhibit.

(Plaintiff's Exhibit 45 marked for identification.)

MR. POWERS: Those are, I believe, all of the items of claim of Fabrizio & Martin.

In addition to those, I was prepared to have

Mr. Fabrizio testify from his books and records concerning

the total cost expended by Fabrizio & Martin in connection

with the construction of this school and, as I say, this

is strictly cost expended based on the books and records.

It does not include any profit or overhead or anything of that nature. I would assume from your Honor's ruling that this evidence is improper as well as evidence with respect to the claims.

Based on raw costs to Pabrizio & Martin, the amount expended in connection with this project was \$2,125,294.41.

It is respectfully submitted that this sum is in excess of the amount paid by the School Board to Fabrizio & Martin at the time of its termination by approximately

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of proof.

\$5000. Also the proof would indicate that in all contracts, construction contracts of this nature, there is -I should not say all, but in the majority of the contracts of this nature, there is a provision for 10 per cent profit and 10 per cent overhead. If these, profit and overhead, were added to the raw cost the total cost to Fabrizio &
Martin would be \$2,571,605, which, obviously, based on what I said previously, would be a cost of over a half a million dollars more than the actual dollars received by Fabrizio &
Martin from the School Board.

I would, therefore, like to introduce as the next exhibits for identification the ledger books of the general ledger and invoice register of Fabrizio & Martin for the years 1964 through 1966 in which all of the costs of Fabrizio & Martin in connection with this project, as well as costs in connection with all other work performed by Fabrizio & Martin during those years is contained.

I request that they be marked as the next exhibit for identification. I might add that they are four ledger books being introduced.

(Plaintiff's Exhibits 46, 47, 48 and 49 marked for identification.)

THE COURT: Are you through, Mr. Powers?

MR. POWERS: I believe that concludes my offer

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MR. YAVNER: If your Honor please, I oppose this offer of proof on the ground that what it would tend to prove is insufficient as a matter of law.

THE COURT: You can't oppose the offer of proof, Mr. Yavner. I have indicated that I don't think that the evidence is properly admissible as to his claim. He has a right to make an offer of proof with respect to that. He can do that.

MR.POWERS: If I may, your Honor, there is one document I failed to introduce and those are the specifications for the contract which deal with a number of the items involved. I would, therefore, request that the specifications be marked as the next exhibit for identification.

(Plaintiff's Exhibit 50 marked for identification.)

THE COURT: Mr. Powers, call your next witness for whatever I would regard as legitimate items that you may establish.

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VINCENT FABRIZIO, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

## BY MR. POWERS:

- Mr. Fabrizio, were you, during the years 1964 through 1966, affiliated with the firm of Fabrizio & Martin, Inc.?
  - A I was.
  - In what capacity?
  - I was president and treasurer of the firm.
- Did you have anything to do with the bidding of 0 the contract for general construction and site work for the Bedford Middle School?
  - I prepared the documents.
  - What documents did you prepare?
- From a takeoff I priced out the job and compiled A my complete bid.
  - And did you prepare the final bid for the job? Q
  - A I did.
  - 0 And did you attend the bid opening?
  - Λ Yes.
  - 0 Do you recall the results of the bid opening?
  - Based upon the base bid, which had many alternates, A

1	tp2 Fabrizio-direct
2	I was second bidder.
3	THE COURT: You mean by that that you were the
4	second lowest bidder?
5	THE WITNESS: The second lowest bidder, yes.
6	O Did you thereafter have any communications with
7	the school board for the Bedford Middle School?
8	A I think, as I recall, either a day or two days
9	later, after the bid opening, I discovered an error in our
10	fill requirements and I so notified the board.
11	Q Did you receive any response to that letter?
12	A No.
13	Q Did you thereafter have any communications with
14	the school board for the Bedford Middle School?
15	A As I recall, about a month later I received a
16	call from Mr. Van Allsberg, who was president of the school
17	board.
18	Q Can you tell us as best you can recall what was
19	said by you and what was said by Mr. Van Allsberg during
20	this conversation?
21	A He asked me if I was still interested in the
22	job, and I told him I wasn't, I wasn't low bidder on it,
23	so I had no interest in the job.
24	He said, "Well, it is possible that the low
25	bidder may refuse to do the job and since you were second
	bidder we will be able to award the job to you and correct

1	tp3 Fabrizio-direct
2	the error that you made in your bid."
3	Q What did you say during this conversation?
4	A Well, I told him I wasn't sure that I was still
5	interested in doing the job.
6	Q Did you thereafter have further communications
7	with Mr. Van Allsberg or anyone else on behalf of the school
8	board?
9	A He asked to meet me in Bedford and to discuss it
10	further. He called me one Sunday, which was, oh, right
11	after this conversation that I had with him, and I met with
12	t.im.
13	Q Did you meet with him?
14	A Yes.
15	He told me that it looks like it looked at
16	that time like I was going to do the job and they could still
17	do it within the appropriation and with our error corrected.
18	Q Did you discuss your error at all during this
19	conversation?
20	A Yes. I told him what it was all about and the
21	school board invited me down to a meeting.
22	O Let us stay at this meeting with Mr. Van Allsberg.
23	Was your error discussed with Mr. Van Allsberg
24	at that meeting?
25	A We didn't discuss too much of the error. He

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1	tp4 Fabrizio-direct
2	realized that there must have been an error, he thought, and
3	he would like for me to discuss it further.
4	Q Did you chereafter discuss it further?
5	A I was invited by the school board to come into
6	their meeting and to prove my error to the board.
7	Q And did you attend such a meeting?
8	A I did.
9	Q And did you bring your records to show to the
10	board how you made the error?
11	A I did.
12	Q To your knowledge, did the school board, in fact,
13	acknowledge that you had made an error?
14	A They acknowledged that I made an error.
15	Q And did anything else occur at this meeting with
16	the school board?
17	A They discussed several items that they thought
18	could be eliminated from the contract.
19	Q Who was in attendance at this meeting that you
20	are referring to?
21	A To the best of my knowledge, Mr. MacNamee was
22	in attendance, Mr. Van Allsberg was in attendance, Mr.
23	Sitervan was at the meeting, Mr. Hart was at the meeting
24	and there was one other fellow that I forget his name.
25	One other gentleman was at the meeting. They are all

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MR. YAVNER: Your Honor, if the sole purpose of this testimony is to establish the circumstances that led to the Court's determination of the illegality of the contract, then I submit that this is unnecessary and irrelavant testimony. If it has a different purpose --

THE COURT: I think you know what the purpose of it is. I certainly know and I know less about the case than you do.

The purpose of this testimony is, I gather, to show that the board knew more about what it was doing than Mr.Fabrizio.

Objection overruled.

- Q Was there anyone else representing the architest or the school board at that meeting?
- A There was an attorney by the name -- the school board's attorney was there, Mr. Carter.
  - Q Anyone from the architect's office?
- A Yes. The architect had a representative. I think his name was Gallagher, but I'm not sure, but he was one fellow that I never saw at the job again.
- O And besides yourself, who was there on behalf of Fabrizio & Martin?
- A I was the only one there from our firm, no one else.

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Fabrizio-direct

A No.

What was the next meeting, as best you can recall, with respect to this project -- the next meeting or telephone call?

I believe one of the architects representative --I believe it was Joe Scippa from the architect's office -called me and asked me to give him a cost of certain items that they were planning to eliminate from the contract.

- Was Mr. Scippa Mr. Crane's predecessor on the project?
  - A He was Mr. Crane's predecessor, yes.
  - Did you say Mr. Scippa gave you a list of items? 0
  - A Items, yes.
- What did he ask you to do, take off and give a price on it?

Oh, he gave me seven or eight items for discussion and I had our estimator work on them to compile the costs on them, and he was supposed to come back to our Darian office and discuss it with our estimator. However, he didn't do it, and Mr. Van Allsberg called me and asked if the architect had received all the information he requested and I told him we are waiting for the architect to come down to our office.

I think a day or two later, as I recall -- it

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was a long time ago -- it wasn't a long time after that conversation that Chip Harkness, who was the architect in charge, called me and asked me to send my estimator to Boston to their office to discuss the changes with him, which I did. I let my estimator go to Boston and they discussed the changes.

Q What was the result of that meeting, to your knowledge?

A We agreed on what certain items to be eliminated were worth. I wasn't sure which items they were going to choose, but we agreed on what costs were on various items.

Q To your knowledge, did the architect agree with the cost with respect to these items?

A Not entirely. He disputed some. He is a typical architect, he thinks the builders charge too much for items and we always think we don't get enough money, but we compromised.

Q Than what happened thereafter?

A Thereafter I was told if I would extend my bid for a certain period of time -- I don't remember the days, but something maybe like 70, 80 days -- and I told Mr.

Van Allsberg that I couldn't do that.

He said there is no harm in it, "If you are interested in the job, I don't see why you would be

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 tp Fabrizio-direct concerned about it."

After that I agreed to do it subject to not being responsible if my subcontractors increased their price -- I remember a letter going out to that effect -- and one other item I think we had in there, that they would be able to use equal materials if we couldn't get the materials specified.

Q After you agreed to extend your bid, what occurred?

A Quite some time went by after that. I'm trying my best to recall.

I think they had a referendum coming up or a discussion on the school. I don't recall all the facts of it. And it seemed like they were going to be able to sliminate items instead of getting more money for the error in our bid.

- Q Did there come a time when there was an agreement between you and the architect as to the items of work to be eliminated and the value of those items?
  - A Yes, there was.
  - Q And was that at the meeting? When was that?
- I don't recall the exact place of that. I believe it was in the Bedford Board of Education office, but I'm not sure.

A Yes. I didn't know the exact changes until the day that I was told I should sign the contract, which was signed in Mr. Carter's office, their attorney in New York

Then there came a time when you executed the

City some place. Then they stapled the changes that were

Q Did you sign the change order?

made on the contract.

A Gee, I don't recall unless I see the document, but I have a recollection of sighing the contract, and if there was another signature on there I probably signed the change order. I don't know.

Q Was there any discussion at that meeting at Mr. Carter's office with respect to the change order?

A No. I think the only time I had a discussion with Mr. Carter and the change order was at that meeting and I think he sent me a letter subsequent to that meeting of the school board when they asked me to review my error.

I remember a discussion I had with Mr. Carter when I saw the contract. They had a completion date in it and I objected to it because the bid documents didn't have a completion date in it, and I told him I didn't see where they got the idea that the school could be built in that time, because I never said it could be.

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Fabrizio-direct

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note as to what they were for.

Do you also indicate thereon the date that you initially requested the change order?

Yes, which is the letter request, the first item

- Are these two sheets in your handwriting?
- Yes, I prepared them.
- Did you prepare this schedule?
- Yes, sir, I did.

Would you go through them, please, and just tell me the date of your request for a change order and then the date on which the change order was ultimately paid.

All right.

The first change order was for rock excavation. Rock excavation started from almost the very first day we started that project. When we started excavating we ran into all sorts of ledge in the area wherever the borings didn't show. Where there wasn't rock and the boring showed something else, we found rock.

What alse would you like to know on this?

- I asked for the date that you made your request and the date on which --
  - This was a continual request on the rock.
  - I think for accuracy purposes, if you will give

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the date of the request, the date of the change order and

then the date of payment, those three dates.

A I don't have the letter of the request listed on that first rock change order, but it was a continuing thing. It was in the early stages of the job, I would say in April and May.

Q All right.

A We received a change order 8/14/64, received a payment on 9/15/64 and the amount of the change order was \$56,500. I think it exceeded the rock allowance by about a thousand or scmething like that.

- Q Change order ? again, the dates, the same way.
- Change order No. 2 was on July 22, 1964.
- Q Was that the request?
- A That was the request. We asked for five days.

We also have an item here the number of days we requested for the change order, andwe asked for five additional days on that change order.

This change order was revised on 8/20/64 and revised on 9/1/64. The date of the change order was 10/23/64.

- Q And the date of payment?
- A We received payment on December 15, 1964, and the amount of that change order was \$1064.75.

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## V.Fabrizio-direct

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Q Change order 3? Just move along a little faster, please, Mr. Fabrizio.

A Change order No. 3 was requested on 10/8/64, date of change order was 11/16/64, received payment in April, April 8, 1964.

Q April 8, 1964?

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- A 1965, I'm sorry.

  The amount of the change order was \$3,000.
- Q Change order 4.

A Change order 4 requested on July 14, 1964, we asked for seven additional days. The date of the change order was July 7, 1965, which was a little over a year later.

- Q All right, go ahead.
- A We received payment on July 7, 1965.
- Q Change order 5.

A Change order 5, there were various letters of request. I don't have the exact time in it, but our change order was 4/27/05. We received payment on July 7, 1965.

Q Next item.

A Item No. 6, letter of request was April 21, 1965. We requested 14 additional days and this was revised again on July 1, 1964 --

- Q 1964 or 1965?
- A I have 1964, but it is 1965. I made an error

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V. Fabrizio-direct

on that computation.

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The date of the change order was 7/16/65, and we received payment 7/7/65.

Next item.

Letter of request on item No. 7 was May 5, 1964. It was revised three times, on May 11, 1965 and it was revised on June 4, 1964, which was almost a year before, and we had another revision on 4/26/65.

There were three of them on that item.

The date of the change order was July 8, 1965 and we received a payment on it some time in August of 1965. I don't have the exact date.

Next item.

No. 8, received a letter of request on November 4, 1964, also we received a request on April 29, 1965.

We asked for 45 additional days for this change order. The date of the change order is December 15, 1965 and received payment on December 15, 1965.

Next item.

The next item is No. 9, requested on June 24, 1965, letter of change order is December 15, 1965, and received payment December 15, 1965.

You have the same information for all of the change orders, doyou not?

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A Right, I do.

MR. POWERS: I would like to have this marked as an exhibit for identification, please.

(Plaintiff's Exhibit No. 51 marked for identification.)

You indicated that you had made requests for additional time in connection with some or all of these change erars, did you not?

Yes, I did. A

Did you receive any additional time with respect to any of the change orders?

A I think as it ended up we did not, but I think at one time they gave us three days on a change order and then later corrected it and took it off, but I don't think we ended up with any extra time.

I believe they gave us one day. I think they gave us one day extra time.

Were you given any reason as to why the time extension was not granted?

I don't recall the exact reason for it. A

Is it your contention that by reason of these change orders, the length of time it took you to perform your work was extended?

A I didn't get the question.

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## V. Pabrizio-direct

- Q Is it your contention that by reason of these change orders the length of time it took you to perform the contract work was actually extended?
  - A It should have been extended, yes, definitely.
- Q I show you this document, Mr. Fabrizio, and ask you if you can identify it.
  - A Yes, I can identify it.
- Q Could you tell me, it is a yellow sheet of handwritten notes on it--
  - A Handwritten notes in pencil.
  - Q Will you please tell me what it represents, sir?
- A It represents the requisitions for payment on the Bedford School. It gives the number of days we requested, requisition date, date we were paid on the requisition and date of the check and when the deposit was made.
- O And also it has in the first column, is that how many days late the payment was?
- A Yes. The number of days that the payment was late.
- Q Did you prepare this or help to prepare this document with me?
  - A Yes, I did.
- Q And you obtained the information from the requisitions and I wrote them down?

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A Right, I obtained the information and you wrote it down.

MR. POWERS: I offer that as the next exhibit.

(Plaintiff's Exhibit No. 52 was marked for identification.)

- O In reviewing Exhibit 52, with respect to any of the requisitions, were you paid on the date or before the date that the payment was actually due for any of them?
  - A I think just on one.
  - Q On one you were paid on time?
  - A Right.
  - Q And there were--
  - A 19 that we received payment --
- What is the longest time of delay in receiving payment?
- A 33 days is the longest and the one next to it is 17.

There is one that is 110 days late. That is No.9.

- Q Mr. Fabrizio, did there come a time in late 1965 when the School Board started deducting liquidated damages from your requisitions?
  - A Yes, there was a time.
- Q And did you have any correspondence or any conversations with either a representative of the School Board or

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architect with respect to these liquidated damages?

- A Yes. We had both conversation and correspondence.
- Q Did you thereafter have a meeting with the School Board with respect to the liquidated damages and various claims that you had made against the School Board?
- A Yes. We started having these discussions at meetings late in 1966, October or November.
- Q Did these discussions culminate into a meeting held thereafter?
  - A Yes, we had a meeting because of that.
  - Q And do you recall when that meeting was?
- A We had several meetings. I can recall one big meeting in Mr. Yavner's office on February 1st, 1966, and prior to that time, -- oh, about the end of the year we had a meeting.
  - Q Do you recall what was discussed at that meeting?
- A Yes. I complained about not receiving my payments on time, about the architect or the owner's representative stopping us from performing our contract because of the various changes, we were not given any decisions on changes when we should have. We would start work and we were unable to complete them because they were changed again because we discovered more rock or it was costing too much money and they had to do it a cheaper way.

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In the meantime, our equipment and our people were just standing around waiting for decisions.

It got to a point where they were holding up our requisitions, not paying us on time, stopping us from per forming our work and not processing the change orders after they were performed and we expended all the money. They didn't pay us for it. They didn't even give us a change order for it.

- Q Were these various items discussed at that meeting?
  - A Yes, they were.
- Who was present at the meeting, to your recollection?
- A Mr. Crane was present, who is in the court; Mr. Yavner; I believeyou and Les Hines were at the meetings-
  - Q I am talking about this one meeting in Pebruary.
  - A In February? All right.
    - Mr. Yavner, Oliver Kirchoff, Les and yourself--
  - Q By Les you mean Mr. Hines?
  - A Mr. Hines.
- Mr. Crane and Mr. Beardsley, who is the owner's representative.
- Q In connection with that meeting, had Mr. Crane prepared a schedule of some type?

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Yes. He prapared a schedule of the change orders that were going to be processed.

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Another big item at that meeting, Mr. Powers, was that they were holding liquidated damages, too.

- I show you Defendant's Exhibit 82, and ask you if this is the original of the schedule to which you just referred as having been prepared by Mr. Crane?
  - Yes, it looks like the same exhibit.
- And were those the items of claim that were discussed at the meeting?
  - A These were the items of changes in extras-
  - That you were claiming?
- That we were claiming, but it does not include the liquidated damages and the delays on these claims , yes, but these are the items we discussed.
- Were any determinations made with respect to those items, to your knowledge?
- The smaller items they said they would pay us. The big ones they were going to think about.
- Did certain of those items result in change orders 15 and 16?
- I think they eventually ended up as change orders A on our last requisition for which we never received payment.
  - Q Do you recall what the result of discussion of

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item 7F was, namely, the fill purchased oof the site by reason of the use of the borrow pit?

- A They were going to discuss that further.
- Q Who was going to discuss it?
- A Mr. Yavner, Mr. Crane and Mr. Beardsley were going to discuss it with the School Board, and subsequently they issued a partial change order, that same item for, I think, around \$6,000.
- Q Do you recall whether Mr. Crane sent you a letter outlining what occurred or summarizing what occurred at the meeting?
  - A Yes, I saw a letter just the other day.
  - Q Do you have a copy of it?
- A I don't have a copy with me, no. It was one of those letters that when I entered the witness box I gave you-- didn't I?
- Q I show you Defendant's Exhibit 83, and ask you if this is a copy of the letter that you received from Mr. Crane.
  - A Yes, I recall this letter.
- O Does this letter indicate that in addition to the purchase of fill, that there were other items that were to be checked by Mr. Crane?
  - A Yes. There were five items to be checked by

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Was Mr. Crane supposed to check furt	her into
ress photographs, item 10F?	
I don't see 10F on this.	
Let me show you, on page 2 of the le	tter, it states
remaining items, Nos. 1F, 2F, 3F, 4F	and 5P had
porarily withdrawn by common consent	for prelimi-
cussion by the attorneys for Fabrizio	& Martin and
ol Board. The rest are still being	checked by
ce"; namely, Mr. Crane's office.	
Right.	
Does the rest of the items referred	to in that
include the progress photographs?	
Yes.	
Does it include the extra for trench	rock?
Yes.	
Which is an item of \$22,000?	
Right.	
Does it also include other items con-	tained on
82?	
Yes.	
I believe you said that meeting was he	eld on Febru-
	I don't see 10F on this.  Let me show you, on page 2 of the le remaining items, Nos. 1F, 2F, 3F, 4F aporarily withdrawn by common consent acussion by the attorneys for Fabrizio col Board. The rest are still being ace"; namely, Mr. Crane's office.  Right.  Does the rest of the items referred include the progress photographs?  Yes.  Does it include the extra for trench yes.  Which is an item of \$22,000?  Right.  Does it also include other items con 82?  Yes.

That's right.

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Q Between February 1st and February 18, did you hear anything from Mr. Crane or Mr. Beardsley or Mr. Yavner with respect to those items that were to be checked?

Did you hear the question, Mr. Fabrizio?

- A No, I didn't. Please repeat it.
- O I said, with respect to those items that were to be checked by either Mr. Crane or Mr. Beardsley or Mr. Yavner, did you receive any word from them between February 1 and February 18 with respect to those items?
  - A To the best of my recollection, I didn't.
- Q I show you this letter of February 18, and ask you if you can identify it, please.
  - A Yes, I can identify it.
- Q Will you tell the Court, please, what that letter is?
  - A Can I take this card off it so I can read it?
  - Q Yes.
  - A Would you like me to read it or tell you about it?
  - Q No, just tell us.
  - A Let me read it over first.
  - Q Can you just tell us what the letter is, Mr. Pabrizio
- A Yes, we received their check No. so and so in the amount of \$42,000 which is payment on requisition No. 20, and the amount of the requisition was substantially less

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V. Fabrizio-direct

than was approved by the architect.

- By this letter, were you complaining about the reduction?
- We were complaining that they withheld funds that A were approved from the sequisition and we were asking them tomake immediate payment.
  - Do you make any other complaints?
  - A Yes.

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- What? 0
- They also -- this is an awful bad copy, I can just A about read it.
  - I'm sorry, it is the only copy I have. Q
  - A The printing is so light.
  - Q What other complaints did you make, Mr. Fabrizio?
  - A I can't read part of it.
- MR. POWERS: I would like to offer this in evidence, please.

MR. YAVNER: No objection.

(Plaintiff's Exhibit No. 53 received in evidence.)

Did you have any conversations with either Mr. Beardsley or Mr. Yavner or Mr. Crane between February 1 and February 18 with respect to these claims that were to be checked into?

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# V. Fabrizio-direct

the change order items or anything else?

- No, I didn't hear anything from them.
- I said did you have any discussions with them?
- A No.
- Did you receive any response to your letter of March 2, 1966?
  - A No, I did not.
  - That is Defendant's Exhibit 54.
  - That is the exhibit I just looked at? A
  - Q Yes.
  - No. No. I did not. A
- I show you a letter of March 4, 1966 and ask you Q if you can identify it, please.
  - Yes, I know the letter. I looked at it previously.

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	Q Did you receive a copy of that letter?
	A It is marked that we did, yes.
	Q Is that a letter from the School Board to the Aetna
1	Casualty Company?
	A Yes, sir.
7	Q What does it say? Would you read the letter,
8	please?
9	A "In view of the letter received today from
10	Fabrizio & Martin, a copy which is enclosed, and because
11	of the urgency of the situation and our desire to mitigate
12	possible damages caused by further delay, please begin
13	making the necessary arrangements to employ another con-
14	tractor to complete the unfinished work of Fabrizio & Martin
15	Q What was your intent in your letter of March 2,
16	1966, to the School Board?
17	A Well, we sent the letter with the intent that it
18	would wake the Board up and they would process these changes
19	and not take the liquidated damages from the requisitions
20	and pay the requisitions on time.
21	We didn't mean that we would stop the job. We
22	just were trying to put pressure on them to perform those
23	items in the contract.
24	Q Is that letter of March 2, 1966 the only response
25	that you know of from the School Board with respect to your

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Or verbal communications within a short span after

Yes, we met with representatives of the School Board and Mr. Yavner subsequent or after this letter here.

That was a good bit after this letter?

MR. POWERS: I would like to offer this letter

MR. YAVNER: Is the letter that is enclosed to which reference has been made, the one you have there?

MR. POWERS: I would assume it is the March 2

(Plaintiff's Exhibit 55 received in evidence.)

Mr. Fabrizio, when you say you met with Mr. Yavner and so forth, is that the meeting that Mr. Greenberg re-

Just one more thing, Mr. Fabrizio, could you tell me, please, to the best of your recollection, who was present at the signing of the contract on March 17, 1966,

sentative.

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I was there, Mr. Carter was there, Mr. Van Allsberg was there and Joe Schappa was there, the architect's repre-

THE COURT: In 1966?

at Mr. Carter's office?

THE WITNESS: This is in 1964, I'm sorry. This was the original contract in 1964.

MR. POWERS: I have nothing further of this witness except that I would, I think, like to now put in evidence the various documents that were introduced in connection with my offer of proof.

Unless I am mistaken it is proper that they actually be marked in evidence and not just be marked for identification. They have all been marked for identification only.

I would therefore respectfully submit or request that they now be marked in evidence.

THE COURT: All right.

MR. POWERS: Thank you, your Honor.

I have nothing further.

MR. TOPLITZ: I have nothing, your Honor.

THE COURT: Mr. Yavner?

CROSS-EXAMINATION

BY MR. YAVNER:

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Mr. Pabrizio, were you present at the hearing in Judge McLean's Court when the question of legality of this contract was being tried?

I was.

Do you remember that a tape recording of the meeting at the office of the Board of Education was played there and that a transcript was introduced in widence there, do you recall?

Yes.

So you can follow it, I am reading from pages 8 and 9 of the pretrial order; do you recall Mr. Van Allsberg, the chairman of the board then, said "See, we find ourselves up with the problem that under state law if we would then take your change of figure here it would then violate the basis upon which we could then grant the contract because this would mean a change in the overall figures.

"Now in order forus to be able to do this thing it simply means that there would have to be a waiver of the \$171,000 and then there would have to be some way that we could find making this thing up somewhere along the line.

"Have you got any bright ideas?"

Do you remember that remark being made by Mr. Van Allsberg?

I remember seeing it in the transcript but it's

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been so long ago, Mr. Yavner, he may have said it but I don't recall the exact words.

MR. TOPLITZ: I am going to object to this because it is misleading. The whole transcript is in here. He was not talking -- Mr. Van Allsberg was not talking to this witness. You can see the answer which is next.

The architect said it.

THE COURT: I don't understand what this is all about anyway.

After hearing discussion by the chairman of the Q board and the architects and the others about how and whether to remove that \$171,000 worth of work, do you remember that you then said, "I would be willing to cooperate as much as you people would like me to."

I remember telling them I would cooperate but that A was all.

You referred to receiving a check for \$48,000 which was less than had been approved by the architect for a particular requisition.

Do you recall what the difference was for?

- Which requisition was that?
- The requisition referred to in your letter of February 18.
  - Was it No. 20?

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MR. POWERS: If you show the witness the letter we can see what requisition it is.

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MR. YAVNER: Which exhibit number was that letter? I don't have it here.

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MR. POWERS: Here it is.

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I show you Exhibit No. 53, your letter of February 18, 1966, in which you refer to payment of \$42,124.10, in payment of requisition No. 20.

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In that letter are you not alleging that the board was paying you less than the architect had approved?

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THE COURT: Mr. Fabrizio, the answer to that is obviously yes.

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You testified to that a few minutes ago.

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THE WITNESS: Yes, sir.

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Refreshing your recollection by looking at that letter, do you recall what the difference was for?

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Judging by the date on it I would say it was liquid-

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ated damages. It isn't in the letter, though.

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Do you recall that the board wrote or do you recall getting copies of letters from the board to the bonding

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company stating to the bonding company that it was with-

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holding liquidating damages unless the bonding company gave

permission for the payment to be made to you? Do you re-

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member getting copies of such letters?

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- I remember correspondence, yes.
- Do you recall that the bonding company did not give such permission?

I thought they did, Mr. Yavner, with a proviso. I don't mecall what it was but we do have correspondence on it.

You spoke before of the delays in payments and you referred to one delay that amounted to 109 days of payment, 100 days of delay?

- A Right.
- Do you remember what period that was?

A No, sir, I don't. It is on that schedule that we prepared. It is in one of the exhibits.

- Q You mean this Exhibit 82?
- I think that in it. Let me look at it, please. A
- Surely.
- No, this isn't the one, it is a yellow sheet. A
- Don't you recall that that was for your payment 0 of December 30, 1964, requisition No. 9?
  - I don't recall the requisition number.
- And that that was the requisition immediately or just about which time you walked off the job the first time and that you were paid on April 1, 1965 for that when you returned to the job?

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3	A	It is possible.	
	Q	I show you Exhibit 124 and the attachment to	it.
5		Is that your signature at the end of it?	
6	A	Yes.	
7	Q	Is this the application that you made to Aetn	a
8	Casualty	for the bonds in question in this proceeding?	
9	A	It looks like it, yes.	
	0	I direct your attention to questions 7 to 13.	
10	2028	Did you fill in any of those questions?	
11	A	7 is filled in.	
		MR. TOPLITZ: This is the same thing we went to	hrough
13	last time	•	
14		MR. TRAGER: The document speaks for itself and	d it
15	is in evi	dence.	
16		THE COURT: What is the purpose of it?	
17		MR. YAVNER: Information is called for here is	ndi-
18	cating ab	out the nature of the contract and the bidder	s and
19	the amour	at of the base bid and all of this information	is
20	left off	here and I wanted to question the witness about	ut it.
21		It is true that the document speaks for itsel	f
22		THE COURT: Well, ask him something about it.	
23	Don't ask	him whether it has been filled in. It is ob	-
24	vious it	has not been filled in.	
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When did you file this application which is dated

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March 17, 1964 with the bonding company?

A It was prior to the bidding. I don't recall the exact date, I'm sorry. It was prior to the bidding. We always file an application before we bid a job.

Q What time was the execution of the contract in Mr. Van Allsberg's office?

A I believe it was in the middle of March, around March 18, 1964, around that time.

Q What time of the day? It was on March 17, 1964.

Do you recall what time of the day it was?

A I believe it was in the morning. I am not sure, though. I don't have that good a recollection.

Q This application was executed by you on the same day, March 17, 1964.

Had you delivered this prior to the meeting in the Board offices to the bonding company?

- A The application for bond, yes, I would say I did.
- Q On the same day but prior to the meeting at the Board office?

A Not on the same day. I don't know, I don't have the exact date.

- O Since you dated this on the 17th --
- A It must have been signed on the 17th.
- Q Since you signed it with a date of the 17th, is it

1965?

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	Q	Yes.	
	A s	I was working on the 8th, the 11th	
	Q	That was a week-end then?	
	A	Yes, we were working on the 11th and 12th but	not
the	10th.		
	Q	Is it so that you worked on the entire month	o <b>f</b>
Tanı	ary?	25 20 50 that you worked on the entire month	O1
Jane			
	A	Yes.	
	Q	Is it so that you worked up to the 11th day o	f
Febr	uary?		
	A	Yes.	
	Q	The 11th day of February, right?	
	Α	Right.	
	Q	After the 11th day of February, March 25th wa	s
the	next	day you worked?	
	A	Yes, March: 25.	
		MR.POWERS: I have nothing further.	
		THE COURT: You are excused, Mr. Fabrizio.	
		(Witness excused.)	
		MR. POWERS: The plaintiff rests, your Honor.	
		MR. YAVNER: If your Honor please, I wish to	make
an o	offer.	Yesterday Mr. Brandes had not come although	h I
expe	cted	him. At my request he did come and he has b	een
here	for	a couple of hours. I have here the time-mater	ial

sheets on the requisitions from Mars to which he can testify and also I have here Mr. John Pine, who actually signed a number of these requisitions.

THE COURT: You can make an offer of proof but not because of the fact that you can't bring a witness in but because of the fact that the Court ruled that the evidence is inadmissible and you can make an offer of proof but not because you can't get a witness on.

MR. YAVNER: May I be permitted to get the witness on now in order that he may identify the documents which are here and which are the time materials? I am asking you to permit me to do that now. I arranged to have him come yesterday but he didn't come. There was no way I could reach him yesterday afternoon.

THE COURT: I am afraid that is your problem. The Court was here and available.

MR. POWERS: Your Honor, I might be sympathetic:
and I think under normal circumstances I would be, however,
in connection with that Mr. Brandes was examined before
trial and during the course of that examination Mr. Brandes
indicated that he was the general superintendent for MarsNormal, that he visited the job every second or third working
day and when he did visit it was for about a half-day which
meant that he visited the job one day a week, the maximum,

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one and a half days a week. Obviously Mr. Brandes did not prepare them, had nothing to do with their preparation and is not familiar with the contents thereof.

Therefore, I strenously object but I am also of the feeling that these documents could not get through through Mr. Brandes to begin with.

THE COURT: Under those circumstances it seems to me you ought to let Mr. Brandes go on the stand and object to them.

MR. POWERS: I don't feel I have to go through that.

MR. TRAGER: I think your Honor closed Mr.Yavner's case this morning.

MR. YAVNER: Yesterday I said to you that subject to my being able to get hold of Mr. Brandes.

THE COURT: That day. Subject to your being able to get hold of Mr. Brandes that day.

MR. YAVNER: But I was not able to. I do have this material here and I think that in the interest of justice I should be permitted to have this reopened.

THE COURT: The problem, of course, is not that.

I must say that I have been very displeaded with the manner in which this presentation been made.

MR. YAVNER: I telefphoned his office six times

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vesterday in order to try to find him.

THE COURT: But the point is not that. Don't tell me that because I am not interested in that. I am here and the Court is open and available and I have been here for this witness. The Court is not sitting for the convenience of a witness.

MR. YAVNER: You are right, your Honor.

THE COURT: The point is you indicated in regard to this matter that you had closed your case. The defendants have proceeded with their case on the assumption that you had closed and now you come in with a witness with regard to some testimony that you should have arranged with that witness before.

If the witness had had any interest in the matter of the litigation it seems to me he would have made some arrangements to be present.

MR. YAVNER: Your Honor, I had. He was here two days ago. He was here the day before yesterday and all afternoon. I arranged with him to come back yesterday. He did not come and I tried calling him. I could not reach him until this morning.

THE COURT: What are these things now?

MR. YAVNER: These are the time and material slips in connection with the Mars requisitions. We have here a

group of requisitions --

THE COURT: Did the witness prepare those?

MR. YAVNER: The witness supervised and assigned the men who worked on this on the time basis and was the one who purchased or arranged for the purchase of the materials that are described here.

He is the general superintendent of Mars-Normal assigned to run this particular job and, as I understand it from him, everything that happened on that job is something that he bossed, that he was familiar with personally.

MR. POWERS: I just read from his testimony, your Honor, where he was only on the job, at the maximum, one and a half days a week.

MR. TRAGER: With all due respect to Mr. Yavner, this case has been tried by him in a very highly unorthodox manner. A classic example --

THE COURT: You don't have to give me any examples.

MR. TRAGER: This is another instance of it.

THE COURT: The examples have been replete with regard to this whole matter.

I am going to let you attempt to put these documents in.

MR. YAVNER: I call Mr. Brandes.

THE COURT: Are these documents supposed to be to

Brandes-direct.

verify that the work was done?

MR. YAVNER: They are supposed to be back-up for the requisitions.

THE COURT: Will you kindly answer the question?

JOSEPH BRANDES, called as a witness

by Defendant Board of Education, having been first duly seworn, testified as follows:

MR. YAVNER: Back-up to the requisitions that have already been put in. There are certain documents which constitute back-up which are physically attached to the requisitions. Time and material slips were not attached to them.

Mr. Crane testified that he had examined time and materials slips before he certified payment. He does not have those time and material slips, not on the record, but outside he told me that he returned those time and material slips to the owner, to the Bedford Board of Education which cannot find its copies.

THE COURT: Did I understand from Mr. Powers or from Mr. Trager that you had been asked to produce those in the interrogatories?

MR. YAVNER: In examination before trial.

THE COURT: Yes.

MR. YAVNER: I don't remember if the Board was asked but I know that Mars was asked and these are the ones they produced.

THE COURT: In an examination before trial?

MR. YAVNER: Yes, the examination before trial Mr. Powers just referred to. They were marked in evidence at that examination.

THE COURT: Have you seen all these documents, Mr. Powers?

MR. POWERS: No, your Honor. I asked the School
Board for all the documentation. These came in from MarsNormal. They were marked during a deposition of Mr. Brandes.
Either he or another member of Mars-Normal. Obviously
during the course of the examination before trial I did not
review them. They were produced and I think they were
marked as an exhibit during the deposition.

THE COURT: You mean by that that you did not study them?

MR. POWERS: I just saw them and I could not during the course of the deposition discuss them. There are hundreds of documents there and I never got into detail.

When I took the testimony of the School Board and Mr. Crane, they didn't have them.

THE COURT: All right. Proceed.

### DIRECT EXAMINATION

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#### BY MR. YAVNER:

0 Mr. Brandes, are you employed by Mars-Normel?

A Yes.

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0 What is your position?

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I am general superintendent.

What are your responsibilities and duties as

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general superintendent of the company?

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In essence I supervise from four to six construc-

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tion jobs simultaneously at any one time.

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In the spring of 1966 were you assigned to super-Q vise the construction of the Bedford Middle School?

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A Yes .

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Specifically in connection with that school, with that construction job, what were your responsibilities and

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what did you do?

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every other day for generally speaking a half day. I reviewed the progress of the work. I reviewed with our superintendent the manpower that would be required, the subcontractors that would be required, the sequence of operations, the preparation of all the papers and documents in connection with it, the overall supervision of the job.

In essence I visited the job site approximately

Were time and material slips presented to the Board? Q

A Time and material slips were prepared every day
by the superintendent on the job site. He presented them
to the clerk of the works who checked them and if they were
correct, he signed them.

At the end of each monil I took the time and material tickets, sat down with the clerk of the works, and on the basis of those time tickets I prepared the requisition for payment for that month.

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THE COURT: You did not prepare those documents, though, did you?

THE WITNESS: Those time slips I did not prepare.

Those were prepared in general with possibly an isolated instance -- well, I may have prepared a few of them, but in general they were prepared by the project superintendent himself, who then submitted them to Mr. Beardley or the subsequent clerk of the works, whoever he was.

Q But they were prepared in the normal course of work of your company?

A Yes.

Fabrizio

MR. POWERS: Objection.

THE COURT: I think we don't have to go further with this witness. I don't see how you can get them in. He didn't prepare them. The superintendent on the job site prepared them. The superintendent on the job site is, therefore, the only person who can verify that these are accurate. I don't see how we can get them in.

I will let you try, but my feeling is, from the answer that has been just given, that this is not the proper witness to pursue this with.

This is not the proper witness who can authenticate those documents.

Q Did you say during the course of your testimony

qp2 Fabrizio

MR. POWERS: Objection. This is clear leading of a witness.

THE COURT: Calm down, Mr. Powers. You have done a bit of leading yourself.

The witness has testified that he went over these documents to prepare requisitions and that is not sufficient to indicate that he authenticated them. He took somebody else's word for them. He didn't supervise the making of those documents. You can't even say that. You used them for another purpose.

- Q Did you have any knowledge during the course of a month of what employees were working?
  - A Yes.
  - Q How did you get that knowledge?
- A From visiting the job site, knowing what was going on and knowing the people that had been assigned to the project.
- Q Who made assignment of laborers or other employees to the job site?

A That depended on if they were laborers who were in Mars-Normel's steady employ, I assigned them to the Bedford Middle School. If they had been persons that were hired from the local hall that hiring was done by the superintendent with my knowledge as to the number of

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Fabrizio

2 people that were going to be employed on the job site.

THE COURT: But the superintendent with regard to all of these people on the job site, he was the one who told them what to do, wasn't he?

THE WITNESS: Yes, sir.

Q In connection with material purchases, who made the material purchases?

THE COURT: Mr. Yavner, I think as far as I am concerned this has gone far enough. I will give you the same opportunity that I gave Mr. Powers, and that is I don't think this man is in a position to verify those documents. You can make an offer of proof if you want.

- Q Is the man who is your job superintendent then still in your employ?
  - A Yes.
- Q Could he be brought down here in the next 20 minutes, half an hour?

MR. POWERS: I object, your Honor.

THE COURT: I am not going to have that.

I have been here for five days. If you had properly gotten this case together you would have known this before this.

Sir, you may step down.

(Witness excused.)

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MR. YAVNER: I make an offer of proof of time and material sheets of Mars-Normel which contain -- well, they are dated from on or about May 2, 1966, to on or about November15, 1966. These time and material slips show materials furnished for the Bedford School District for its Middle School under the completion contract of Mars-Normel and materials supplied for that purpose.

I make this offer of proof at this time to support certain of the requisitions which have already been submitted to the Court and certifications by the architect and payments by the school board as shown in Exhibits 100 to 107, inclusive. Although there is, in those requisitions, in those exhibit numbers to which I referred, the requisition with certain supporting documents and the certification by the architect that he has reviewed all the necessary material to establish that these requisitions should be paid in the amount he has certified and there is the voucher of the board showing that it paid it, requests were made for these time and material slips, and I am offering them. If I had additional time to bring the appropriate witness I could submit them.

I can say that even without these time and material slips the certification by the architect is the controlling point.

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THE COURT: Is that all?

MR. YAVNER: That is all, your Honor.

May I have these marked in evidence for that purpose of the offer of proof and may I suggest that they be marked in the sequence they have been tallied in accordance with the particular requisition to which they apply as Exhibits 100, 101 and the like.

THE COURT: I dcn't understand you. You already have an Exhibit 100 and 101.

MR. YAVNER: I have pur them in a particular sequence. They will be marked as one exhibit, I assume.

THE COURT: Whatever the document you are now marking, Mr. Clerk, are being marked as a part of the offer of proof by the defendant, the school board, indicating that these documents -- what is the witness's name?

MR. YAVNER: Joseph Brandeis.

THE COURT: That Mr. Brandeis has been permitted to identify these various exhibits evidencing labor and materials. That is for the Mars-Normel contract.

(Defendants' Exhibit 125 marked for identification.)

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THE COURT: You had daily copies of this and I will want on this case, obviously, post-trial memorandum.

I think one of the parties submitted proposed findings. Was that you, Mr. Powers?

MR. POWERS: Yes, I did, your Honor.

THE COURT: I don't believe I received any from anyone else.

MR. TOPLITZ: Yes, your Honor, we did, also.

THE COURT: That is correct.

MR. POWERS: I don't know how valid they are now, but I did submit some.

THE COURT: I will want post-trial memoranda from all of you to be submitted simultaneously and I want that memoranda geared to the testimony.

How much time would be convenient to submit that?

I think you are going to get the rest of the transcript tomorrow or the next day so we can begin counting from Monday as the time.

How much time are you going to need?

MR. TOPLITZ: Your Honor, may I suggest three weeks on this? The reason is that most of us haven't been in our offices for a good part of the week, and I can't find my desk as it is now.

THE COURT: That gives you a good vacation.

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Is three weeks all right with you, Mr. Yavner?
MR. YAVNER: Yes.

THE COURT: You, Mr. Powers?

MR. POWERS: Yes, sir.

then, on or before March 26th, and any proposed findings of facts or conclusions of law, Mr. Yavner, you will submit them as a part of your memorandum and the other parties will make any additional proposed findings or conclusions that they want to add in view of the testimony.

The briefs are to be exchanged and served at the same time, to be submitted at the same time. If there is anything in any of the briefs that you want to respond to, I will give you a week after the 26th to reply. Those replies, if they are to be filed, will be filed by April 2nd and are to be filed simultaneously.

I would suggest for the plaintiff that you devote a considerable part of your brief to the development of the legal theory which would seek to support your claim that you are entitled to get the value of the services which were performed under this contract or the services you performed in connection with the school.

As you know, I am very dubious about that theory, so I am suggesting that you do that.

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For the additional defendant, I know what your theory is, that there was fraud and deceit and you didn't know about it and, therefore, that you have a right to a counterclaim against the school board under the contract under your surety bond for any amount of money you were forced to pay, including your lawyer's fees.

My suggestion, again, is that you devote a considerable part of your brief developing that contention.

Insofar as the school board is concerned, I think that you had, it seems to me, a rather unclear and changed item of damages that you think you want to recover. It seems to me you ought to make a clear statement what it is you want or what it is you think you deserve.

Since fraud has been alleged insofar a you are concerned, I think that you had better devote some of your argument in this post-trial memorandum to meeting that. It is very clear that that is one of the issues raised, and the evidence, it would seem to me, indicates that the board, being a public corporation and a New York one, apparently knew more about this and about what the law was and what was required than anyone else. I think you better meet that.

All right, gentlemen. Court is adjourned.

1		10 <b>23a</b>	827
2		WITNESS INDEX	
3	Name	Direct Cross Red	Lrect Recross
4	Max E. Greenberg	675 680	
5	Michael J. Suckmir (Resumed)	697 717	
6	Oliver Kirchoff	746	
7			
8	Vincent Fabrisio	772 802	
9		EXHIBIT INDEX	
10	Defendents	Identification	In Evidence
11	D		696
12	E,F,G,H		697,703
18	I	705	707
14	J	707	709
15	K		8 710
16	L,M		710
17	N,O		711
18	P		717
19	123		720
20	124		722
21	125		823
22	Plaintiff		
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24	33-A and 33-B		730
25	34		736

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2	Platesiff		Identification	2	n Ev:	dence
3	. 36		759			
4	37		759			
5 6	38		760			
7	39		761			
8	40		763			
9	41		764			
10	42		767			
11	43		768			
12	44		768			
13	45	# 40%;	769			
14	46 through	49	770			
15	50 51		771			
16	52		788 790			
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18	54					798
19	55					001
20						



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FABRIZIO & MARTIN, INCORPORATED, 1082 Post Road, Darien, Connecticut,

bereinafter called the Contractor, and BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2,

OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, WEST-CHESTER COUNTY, NEW YORK,

130 Main Street, Mount Kisco, New York, hereinafter called the Owner,

WITNESSETH, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

ARTICLE 1. SCOPE OF THE WORK

The Contractor shall furn.sh all of the materials and perform all of the work shown on the Drawings and de-

scribed in the Specifications entitled Middle School, Bedford, New York (Drawings & Specifications dated November 7, 1963) and as far as applicable in Addenda Nos. 1,2,3,4 & 5.

(Here insert the caption descriptive of the work as used on the Drawings and in the other Contract Documents)

prepared by The Architects Collaborative, 63 Brattle St., Cambridge, Nassachusetts, acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

AGREEMENT BETWEEN CONTRACTOR AND OWNER.
1961 Edition / Five pages / Page 1.

A.I.A. DOCUMENT NO. A-101

The work to be performed under this Contract shall be commenced within 10 days of the execution of this contract and shall be substantially completed September 15, 1965.

(Here insert stipulation as to liquidated damages, if any.)

#### ARTICLE 3. THE CONTRACT SUM

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deduc-

tions provided therein, in current funds as follows: Two Million Four Hundred Eighty-nine
(State here the lump sum amount, unit prices, or both, as desired in individual cases.)

Thousand Four Hundred Dollars (\$2,489,400).

Base Bid				\$2,326,900		
Alternate	Bid	No.	3	99,000		
Alternate	Bid	No.	4	51,000		
Alternate	Bid	No.	5	12,500		
Alternate	Bid	No.	9		Not	included in this contract
Alternate	Bid	No.	11		Not.	included in this contract
				\$2,489,400		

The attached Exhibit 1 setting forth a schedule of unit prices shall be used in adjusting the contract sum to cover changes in the work.

Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the Contract to prevent such hardship.

AGREEMENT BETWEEN CONTRACTOR AND OWNER.

1961 Edition / Five pages / Page 2.

## Schedule of Unit Prices

## Contract between Fabrizio & Martin, Incorporated and Board of Education.

	1.	General Excavation		\$1.10	per	cu.yd.
	2.	Trench Excavation		1.75	per	cu.yd.
	3.	Removal of stacked excavated material from site		. 1.00	per	cu.yd.
	4.	Back fill due to extra excavation		.50	per	cu.yd.
	5.	Rock excavation, encountered in general excavation or grading, using explosives		10.00	per	cu.yd.
	6.	Rock excavation using explosives in trenches		18.00	per	cu.yd.
	7.	Footing and Foundation Concrete in place including reinforcement and accessories				cu. yd.
	8.	Exposed Concrete in place including reinforcement and accessories	Add Deduct			cu.yd.
	9.	Wall and footing forms including stripping	,	.70	7.× per	Seff.
1	10.	Bituminous concrete paving in place, including base courses	193			55. 4d
1	11.	Portland cement concrete paving in place	/			S.FY.h
1	L2.	Concrete curbing in place	(	3.25	per	en ft.
1	L3.	Shoring or sheeting left in place		.60	per	sq.ft.

The Owner shall make payments on account of the Contract as provided therein, as follows:

On or about the tenth day of each month Ninety (90) per cent of the value, based on the Contract prices of labor and materials incorporated in the work and of materials suitably stored at the site thereof or at some other location agreed upon in writing by the parties up to the first day of that month, as estimated by the Architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to 90 per cent of the Contract price

(Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.)

ARTICLE 5. ACCEPTANCE AND FINAL PAYMENT

ings

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

AGREEMENT BETWEEN CONTRACTOR AND OWNER.

1961 Edition / Five pages / Page 3.

Before the final payment is made to the contractor, it shall be the duty of the Clerk of the owner to require of the contractor, and the contractor shall file his own and each subcontractor's statement in writing, in form satisfactory to such officer, certifying to the amounts then due and owing from the contractor and each subcontractor executing such statement to an one for labor performed or materials supplied on the job for which such payment is due, setting forth therein the names of the persons whose wages and/or claims for material or supplies are unpaid and the amount due to each respectively, which statement shall be verified by the oath of the contractor or subcontractor as the case may be, that he has read such statement subscribed by him and knows the contents thereof and that the same is true to his own knowledge.

### Article 6. The Contract Documents.

The General Conditions of the Contract, the Supplementary General Conditions, the Specifications and Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated. The following is an enumeration of the Specifications, Drawings and other documents (parts I - IV) incorporated in and made a part of this agreement.

#### PART I: GENERAL REQUIREMENTS

#### Section:

- A. List of Contract Drawings
- B. Advertisement for Bidders
- C. Proposal Forms
- D. Instructions to Bidders
- E. Wage Rates and Anti-Discrimination Paquirements

A 3 2 2 10 - 2 10

- F. General Conditions of the Contract
- G. Supplementary General Conditions

- H. Test Boring Reports
- I. Alternates
- J. Cash Allowances
- K. Work Not Included

## PART II: TECHNICAL SPECIFICATIONS

#### Division:

- 1. Excavation and Sitework
- 2. Concrete
- Structural Steel
- 4. Masonry
- 5. Waterproofing and Dampproofing
- 6. Roofing and Sheet Metal
- 7. Miscellaneous Metal Work
- 8. Hollow Metal Work
- 9. Metal Toilet Partitions
- 10. Steel Windows
- 11. Carpentry and Millwork
- 12. Folding Partitions
- 13. Elevator and Dumbwaiters
- 14. Lathing and Plastering
- 15. Acoustical Tile
- 16. Ceramic Tile, Marble and Slate
- 17. Glass and Glazing
- 18. Calking
- 19. Painting
- 20. Resilient Flooring
- 21. Finish Hardware
- 22. Site Improvements
- 23. Not used
- 24. Sewage Disposal and Water Supply
- 25. Plumbing
- 26. Heating and Ventilating
- 27. Electrical

#### PART III

- Site Development:
- SD-1 General Site Plan
- SD-2 Layout and Site Plan
- SD-3 Detailed Site Plan
- SD-4 Playfields and Tennis Court

- SD-5 Running track and football
- SD-6 Site Details
- SD-7 Site Details
- SD-8 Drainfield
- SD-9 . Sewage Disposal Details
- SD-10 Sewage Disposal and Well Details

#### Architectural:

- A-1 Floor Plans, Academic Houses
- A-2 Reflected Ceiling and roof plans, academic houses
- A-3 Elevations, academic house A and B
- A-4 Elevations, academic house B and C
- A-5 3/4" wall sections, academic houses
- A-6 3/4" wall sections, academic houses
- A-7 Interior elevations, academic houses
- A-8 Schedules, academic houses
- A-9 Window and door details, academic houses
- A-10 Stair details, academic houses
- A-11 Miscellaneous details, academic houses
- A-12 Interior details, academic houses
- A-13 Exterior details, bridge and shelter
- A-14 First floor plan, central building
- A-15 Second floor and third floor plans, central building
- A-16 1/4" plans of stair bays, central building
- A-17 Roof plan and first floor ceiling plan, central bldg.
- A-18 Second and third floor ceiling plans, central building
- A-19 1/4" section, central building
- A-20 Exterior elevations, central building
- A-21 Schedules, central building
- A-22 Interior elevations, central building
- A-23 Interior elevations, central building
- A-24 Exterior wall sections, central building
- A-25 Wall sections and details, central building
- A-26 Interior wall sections, central building
- A-27 Window and door details, central building
- A-28 Stair and folding partition details, central building
- A-29 Exterior details, central building
- A-30 Interior details, central building
- A-31 Exterior stairs, central building
- A-32 Lower level plan, gymnasium
- A-33 Upper level plan, gymnasium

- A-34 Elevations, gymnasium A-35 Sections, gymnasium
- A-36 3/4" Wall sections, gymnasium
- A-37 3/4" Wall sections, gymnasium
- A-38 Interior elevations, gymnasium

#### Structural:

- S-1 General notes and typical details
- S-2 Academic house "A" foundation and first floor plan
- S-3 Academic house "A" second floor framing plan
- S-4 Academic house "A" Roof framing plan
- S-5 Academic houses A B and C column schedule and details
- S-6 Academic House "B" foundation and first floor plan
- S-7 Academic House "B" second floor framing plan
- S-8 Academic house "B" Roof framing plan
- S-9 Academic House "C" Foundation and first floor plan
- S-10 Academic House "C" Second floor framing plan
- S-11 Academic house "C" Roof framing plan
- S-12 Central building foundation and first floor plan
- S-13 Central building second floor framing plan
- S-14 Central building third floor framing plan
- S-15 Central building roof framing plan
- S-16 Central building column schedule and details
- S-17 Bridges and abutments
- S-18 Gymnasium foundation and basement plan
- S-19 Gymnasium floor framing plan
- S-20 Gymnasium roof framing plan
- S-21 Gymnasium sections
- S-22 Gymnasium roof details

#### Heating and Ventilating:

- H-1 Central building, boiler room plan
- H-2 Central building, first floor plan
- H-3 Central building, second floor and third floor plans
- H-4 Buildings A and B, first floor plan
- B-5 Buildings A and B, second floor plan
- m-6 Duilding C, first floor plan
- H-7 Building C, second floor plan
- H-8 Gymnasium, lower level plan
- H-9 Gymnasium, upper level plan
- H-10 Central building, riser diagram
- H-11 Plot plan and details
- H-12 Details and schedules

Air Conditioning Alternate:

AC-1 Central Building, first floor plan

AC-2 Central Building, second and third floor plan

AC-3 Buildings A and B, first floor plan

AC-4 Buildings A and B, second floor plan AC-5 Building C, first floor plan

AC-6 Building C, second floor plan AC-7 Central building, riser diagram

AC-8 Plot plan, details and schedule

#### Plumbing:

P-1 Central building, first floor plan

P-2 Central building, second and third floor plans

P-3 Buildings A and B, first floor and trench plan
P-4 Buildings A and B, second floor plan

P-4 Buildings A and B, second floor plan
P-5 Building C, first floor and Trench plan

P-6 Building C, second floor plan

P-7 Gymnasium plans

#### Electrical:

E-1 Plot plan

E-2 Academic buildings A, B and C, power

E-3 Academic buildings, A, B and C, lighting

E-4 Central building, first floor, power and lighting
E-5 Central building, second floor, power and lighting

E-6 Central building, third floor, power and lighting

E-7 Gymnasium, upper level, lighting and power

E-8 Gymnasium, lower level, lighting and power

E-9 Schedules

E-10 Signal risers

#### Audio-Visual Conduit Alternate:

C-1 Academic Houses

C-2 Central building, first floor

C-3 Central building, second floor and third floor

#### PART IV - ADDENDA

Addendum No. 1

Addendum No. 2

Addendum No. 3

Addendum No. 4

Addendum No. 5

IN WITNESS WHEREOF the parties hereto have executed this Agreement, the day and year first

FABRIZIO & MARTIN, INCORPORATED

BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, NEW YORK.

AGREEMENT BETWEEN CONTRACTOR AND OWNER. 1961 Edition / Five pages / Page 5.

Relating to Agreement between Fabrizio & Martin, as Contractor, and Board of Education, Central School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge, New York, as Owner, made this 17 day of March, 1964.

The following work is to be performed at the contract price of \$2,489,400.00 and without change in the price. The modifications listed herein change our agreement executed this /7 day of March, 1964, to the extent specified herein.

In lieu of developing the areas designated as Lower Playfield and Archery Area, the Contractor will obtain fill from the areas indicated as Playfields Nos. 1 & 2 (formerly included under Alternate No. 1). This area will be used as a borrow area for the development of the rest of the contract. If there is insufficient fill in the area or adjoining areas Owner will furnish fill as required to complete contract. If ledge or unsatisfactory material is encountered, the Owner will negotiate with a change order in accordance with the unit prices. The topsoil will be stripped and stockpiled at a location convenient for replacement at a later date by the Owner. The general area will be left rough-graded to generally level grades. Annexed hereto and marked Exhibits "A" and "B" (SD-2 and SD-3) are the drawings defining these areas.

Delete brick paving outside of buildings, but add in the cost of a better finish for the concrete slabs on which the brick paving was to have been placed.

Delete Rip-rap on West Side of Pond at Entrance.

Delete Elevator in Central Building, but leave Elevator Doors as specified.

Delete three dumbwaiters, but leave shall openings to be sealed off with plywood panels to be set in the frames as described in the specifications.

Delete protective snow fencing around contractor area.

Edgar I Jan Allsburg

Alternate No. 3 will be modified in accordance with our drawing dated March 10, 1964 and titled Alternate Scheme No. 1 for Football Field and Running Track. Contractor shall include in this Alternate No. 3 a cash allowance of \$1,677 in the agreed upon price. Annexed hereto and marked Exhibit "C" is a drawing defining the modification.

Dated: New York, N.Y., March /7 , 1964.

FABRIZIO & MARTIN, INCORPORATED

Witness:

BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, NEW YORK.

EXHIBIT D-31 - SUPPLEMENTAL AGREEMENT DATED MARCH 230 1965 SUPPLEMENTAL AGREEMENT made this 2 Stay of

March, 1965, by and between the Board of Education, Central School District No. 2, of the Towns of Bedford, New Castle, North Castle and Pound Ridge, Westchester County, New York, with its principal place of business at 369 Lexington Avenue, Mount Kisco, New York (hereinafter referred to as the "Board"), and Fabrizio and Martin, Incorporated, with its principal office and place of business at 1082 Post Road, Darien, Connecticut (hereinafter referred to as the "Contractor").

## RECITALS:

- A. The Board and the Contractor entered into a Contract dated March 17, 1954 under which the Contractor was to furnish the materials and perform the general construction and site work of the Middle School, Bedford, New York, as shown in drawings and specifications prepared by the Board's architects, The Architects Collaborative (hereinafter referred to as "TAC").
- B. The Contract provided for the substantial completion of the work by September 15, 1965.
- of the Contractor entered upon the performance of the Contract; in the course of said performance certain disputes and differences arose because the Board and the Contractor.

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- D. On or about January 8, 1965 TAC sent a telegram to the Contractor stating that it would not issue a Certificate of Payment to the Contractor for its work during the month of December 1964 inasmuch as the Contractor had failed to comply with various of the terms and conditions of the Contract.
- E. Thereafter TAC issued a Certificate dated January 21, 1965 certifying causes for the Board to terminate the Contract, including the Contractor's failure to provide enough work and materials to maintain its construction schedule, its failure to make prompt payment to its subcontractor San Marco Construction Corporation, and its disregard of various instructions issued by TAC.
- meeting attended by the Superintendent of Schools, counsel to the Board, the Contractor, counsel to the Contractor, representatives of TAC, counsel to TAC, and a representative of Aetna Casualty and Surety Company (hereinafter referred to as "Surety"), the Contractor's bonding company. At this meeting there was a general review of the reasons for TAC's telegram to the Contractor dated January 8, 1965 and of the Contractor's defense of the charges made in that telegram.
- G. Upon refusal of TAC to certify payment of the Contmactor's requisition for the month of December,

1964 the Contractor protested said refusal to certify and the consequent nonpayment, and thereafter suspended performance of its work under the Contract.

H. On February 4, 1965 TAC further certified that the Board had cause for terminating the Contract on the ground that the Contractor had left the job on January 21, 1965, and had not resumed construction, contrary to the conditions of the Contract.

I. Notices of the aforesaid Certificates
were duly given to both the Contractor and the Surety, both
in person at the meeting of the Board held on January 25,
1965 and by letter dated February 5, 1965.

J. By its letter of February 5, 1965 the Board duly gave notice to the Contractor of its intent to terminate the Contract in accordance with the provisions thereof.

K. Since then the Board and the Contractor have engaged in conferences looking towards a resolution of the disputes between them and the resumption of work.

L. On February 13, 1965 the Board held a meeting attended by the Superintendent of Schools, counsel to the Board, the Contractor, coursel to the Contractor, representatives of TAC, counsel to TAC, representatives of

San Marco Construction Corporation and counsel to San Marco Construction Corporation. At this meeting the Contractor and its counsel offered to submit a proposal for the Board's consideration in determining whether to permit the Contractor to resume operations.

M. On February 15, 1965 the Contractor's counsel wrote to the Board's counsel confirming that the seven-day notice of termination of contract was extended without prejudice to the rights and obligations of the Board and the Contractor, in order to enable the Contractor to submit certain proposals and revised construction schedules for review by the Board.

N. Such proposals and schedules were thereafter submitted, and, after further review and negotiation,
led to this Supplemental Agreement.

#### ARTICLES:

## ARTICLE I. RESUMPTION OF WORK.

1. Upon execution of this Agreement the Contractor shall promptly resume performance of the work called for under the Contract.

## ARTICLE II. REVISED CONSTRUCTION SCHEDULES.

1. The Contractor has submitted Revised

Construction Schedules (hereinafter referred to as "Revised

Schedules") which are appended hereto and made a part hereof.

- 2. The Revised Schedules set forth the dates by which the Contractor agrees to substantially complete each major building units of the balance of the work required to be performed, as more particularly set forth in Paragraph 3 of this Article. The Revised Schedules also show the sequence of construction and the approximate periods of time in which each sequence will be completed.
- 3. The Contractor agrees that it shall substantially complete the balance of the work required to be
  performed under the Contract on or before the dates listed
  for each respective building unit in the following schedule:

Building Unit	Date of Completion		
Academic House "C"	November 15, 1965		
Central Building	December 30, 1965		
Academic House "3"	February 25, 1966		
Academic Eouse "A"	May 16, 1966		
Gymnasium	May 31, 1966		
Site Work	As shown in Revised Schedules		

4. Substantial completion of the said work in accordance with the schedule set forth in Paragraph 3 of this Article shall be subject to the Contractor's rights to extensions of time as provided in the Contract.

## ARTICLE III. LIQUIDATED DAMAGES.

1. In case the Congrector shall fail to sub-

stantially complete the balance of the work required to be performed under the Contract in accordance with the schedule of completion dates for each building unit set forth in Paragraph 3 of Article II, the Contractor expressly admits and agrees that the Board will suffer loss and damage by reason of the inconvenience that will result from such failure and delay. In view of the difficulty of ascertaining the loss which the Board will suffer by reason of the delay in the substantial completion of said work by the dates specified in Paragraph 3 of Article II, the sums set forth in Paragraph 2 of this Article III are hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages that the Board will suffer by reason of said delay and default, and not as a penalty; and the Board shall and may deduct and retain out of the moneys which may be due or become due under this Supplemental Agreement and the Contract the amount of such liquidated damages; and the Board may charge such liquidated damages against the Contractor who hereby agrees to pay the same to the Board.

2. In the event that the Contractor fails to substantially complete any building unit of the work in ac-

cordance with the schedule provided in Paragraph 3 of
Article II, as modified by extensions of time, if any, as
provided for in the Contract, liquidated damages shall be
computed for each consecutive calendar day in the period
elapsing from the date when the Contractor should have
substantially completed the said work under the provisions
of Paragraph 3 of Article II and the date when the said
work is actually substantially completed, as follows:

Building Unit	Liquidated Damages Per Calendar Day			
Academic House "C"	\$125.00			
Central Building	\$225.00			
Academic House "3"	\$125.00			
Academic House "A"	\$125.00			
Gymnasium	\$125.00			
Site Work	\$ 75.00			

3. While the Contractor's Revised Schedules for site work show, for example, that the upper parking areas will be completed before the end of August 1965 and the upper and lower play areas before the end of September 1965 and the roads by the end of September 1965, it is understood and agreed by the parties that such planting as, in the sole discretion of TAC, cannot feasibly be done in the summer or fall of 1965 shall be done at such other time as is directed by TAC without thereby being subject to the liquidated damage provisions of this Supplemental Agreement.

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4. Time is of the essence of this Agreement and of the Contract, as to the Board.

# ARTICLE IV. RELEASES AND RESERVATIONS OF RIGHTS.

- The Contractor hereby releases the Board from any and all claims or causes of action for damages sustained or incurred by the Contractor prior to the date of execution hereof, excepting only claims or causes of action for damages incurred by the Contractor as a result of, or by reason of, any acts or omissions of TAC and/or any of the other separate Prime Contractors; provided, however, that if the Contractor does assert any such claim or cause of action against TAC and/or the other separate Prime Contractors, it shall duly file such claim with the Board which shall thereupon duly serve a demand for arbitration upon TAC and/or the other separate Prime Contractors, in accordance with the provisions of its agreements with TAC and/or the other separate Prime Contractors. The Contractor shall present and prosecute its claims or causes of action as a result of, or by reason of, any acts or omissions of TAC and/or the other separate Prime Contractors in any such proceeding at its own cost or expense.
- 2. The Contractor hereby agrees to indemnify and hold harmless the Board against any and all claims or

by either TAC and/or the other Prime Contractors for damages incurred prior to the date of execution hereof by TAC and/or the other Prime Contractors as a result of, or by reason of, any acts or omissions of the Contractor; provided however, that in the event of any such claim by TAC, the Contractor as a that Article 34 of the General Conditions of the Contract shall be deemed amended as if it included reference to TAC as well as to any separate contractor on the work, so that the Board shall therefore have the right to notify the Contractor of such claim or suit by TAC, and the Contractor shall thereupon defend such proceedings at its own expense and if any judgment against the Board arise therefrom, the Contractor shall pay or satisfy it.

- 3. The Board and the Contractor do not by this Supplemental Agreement release, waive or relinquish any right which either may have against the other with respect to any claims or causes of action for damages incurred subsequent to the date hereof.
- 4. The Contractor does not by this Supplemental Agreement release, waive or relinquish, in any manner whatsoever, any claims or causes of action which it has or may have against the Board as of the date of execution of this supplemental Agreement for any allegedly extra or additional work heretofore performed by the Contractor.

- 1. Within five (5) working days after the Contractor's resumption of work hereunder, the Board shall arrange for the certification in whole or in part, in TAC's discretion reasonably to be exercised, of the Contractor's requisition heretofore submitted for the month of December 1964. The Board shall make payment of the said requisition as certified, within five (5) calendar days after its receipt of either the said certification or of the bond or letter relating to San Marco Construction Corporation referred to in Paragraph 3 of this Article V, whichever event shall later occur.
- 2. Within three (3) calendar days after its resumption of work, the Contractor shall submit to TAC its requisition for its work performed in the period ending January 25, 1965, and for any other work theretofore performed as to which there is no dispute as to whether such work constitutes contract or extra work and which is still not paid for. Within seven (7) calendar days after receiving TAC's Certificate for Payment based upon the said requisition the Board shall pay to the Contractor the amount certified therein, provided that it has received from the Contractor the bond or letter relating to San Marco Construction Corporation referred to in Paragraph 3 of this Article V.

3. Within seven (7) calendar days after its resumption of work, the Contractor shall furnish to the Board a surety bond providing for the indemnification of the Board against any claim or claims asserted by the Contractor's subcontractor, San Marco Construction Corporation, in the amount of any such claim or claims as so asserted, or a letter from said San Marco Construction Corporation to the Board advising the Board that it has made satisfactory arrangements with the Contractor and withdraws any claims which it has heretofore submitted against the Contractor. It is expressly understood and agreed by the Contractor that in the event such bond or letter is not furnished to the Board within seven (7) calendar days after the Contractor's resumption of work said failure shall constitute a substantial violation of this Supplemental Agreement and the Contract, in which event the Board may, without prejudice to any other right or remedy it may have, and after giving the Contractor and the Surety three (3) days written notice of such violation, terminate the employment of the Contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method it may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished.

> ARTICLE VI. NO WAIVER BY THE BOARD; NO DIS-CHARGE OF THE SURTON.

<sup>1.</sup> The terms and conditions of the Contract re-

main in full force and effect except as specifically modified herein.

- 2. This Supplemental Agreement shall not constitute a waiver by the Board of any of the terms and conditions of the Contract, and shall not impair such terms and conditions in any way, or the Board's right at any time to avail itself of such remedies as it may have for any breach or breaches of said terms and conditions.
  - 3. This Supplemental Agreement shall not be effective unless it is duly agreed to, executed and acknowledged by the Surety.
  - 4. The making of this Supplemental Agreement, its terms and the events preceding it, shall not constitute a discharge of the Surety, and its performance bond heretofore issued and dated March 17, 1964 shall remain in full force and effect, and this Supplemental Agreement shall be incorporated by reference in said performance bond.

## ARTICLE VII. LAWS OF THE STATE OF NEW YORK.

1. The laws of the State of New York shall govern as to the interpretation, validity and effect of this Supplemental Agreement and of the Contract.

IN WITNESS WHEREOF the parties hereto have

executed this Supplementary Agreement, the day and year first above written.

BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge

Witness:

Oleverysower

By Elan 1.1/on lillahura

(President

FABRIZIO and MARTIN, INCORPORATED

Witness

13/2/

By Jennitalinin

## SURETY COMPANY CONSENT

has furnished a Performance Bond on which the Aetna Casualty and Surety Company is the Surety, which bond is dated March 17, 1964. The Surety consents to the foregoing Supplementary Agreement, and agrees that it is, by reference, made a part of said Bond and that the Surety's obligations under said Bond shall apply to the provisions of this Supplementary Agreement as well as to the provisions of the Contract. The Surety acknowledges that it has been kept informed of the disputes heretofore had between the Board

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and the Contractor and that it is bound by the settlement of said disputes contained in this Supplementary Agreement.

Signed and sealed this 25 day of March, 1965.

THE AETNA CASUALTY AND SURETY COMPANY

By\_

Resident Vice President and Resident Agent State of New York

(Seal)

Attest:

Resident A sistant Secretary

(Attach Surety Company's Acknowledgment)

Hartford, Connecticut 06115

Fower of Attorney and Certificate of Authority of Resident Vice President(s) and Resident As

NOW ALL ...... BY THESE PRESENTS, That The Rine Casualty and Surety Company, a corporation organized under the laws of a Same of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, by its duly authorized effect, does havely appoint a following resident effect (s), with business address indicated below but without territorial restriction, and does grant full power and emission to the Resident Vice President to sign and execute on its behalf, and to each Resident Assistant Secretary to seal and attest on its behalf, any and all bonds, argainances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking and any and all constant cident thereon, and all . In insurances signed by any one of said Resident Vice Presidents, when scaled and attested by any other possess and all sealed and attested:

ABSIDENT ASSISTANT SECRETARY (185) RESIDENT VICE PRESENT(8) Roy L. Fosbrink Roy L. Fosbrink C. Q. Christensen C. Q. Chilstensen R. B. Pratt ... B. Pratt B. D. Field B. D. Field G. W. Murphy G. W. Murphy K. K. Dayer K. K. Dwyer F. Donohue J. P. Donohue

BUSINESS ADDRESS Hartford, Connecticut

These appointments are made under and by authority of the following provisions of the By-laws of the Company which provisions of mid By-laws:

ETICLE IV—Service 8. The Pendlent, any Vice Pendlent, or any Secretary may from time to time appoint Resident Vice President, Resident Authority as his comingue of such may penetribe as sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other weldings oblight in the sanure of a constant pendless and sevelar recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time someone any such pendess and sevelar recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice President or by a Resident Vice President personnel of the certificate of sushority of such Resident Vice President, or a utilization of such Resident Vice President or a Vice President or a Vice President or a vice pendent of authority of such Resident Vice Presidents or authority of such Resident Vice Presidents or authority of such Resident Assistant Secretary; or duly executed (under seal, if sequired) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificates or confidence of charty.

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following Resolution adopted by the test of Directors of The signs Cassally and Surety Company at a meeting duly called and held on the 15th way or Tebruary, 1993.

RESOLVED: That the algunture of Guy E. Mann, Senior Vice President, or of A. H. Anderson, Vice President, or of D. N. Gaga, Secretary, or of N. H. Pfantiel, Secretary, and the seal of the Company may be affixed by facsimile to any power of structure or any coralicate selating assess appointing Resident Vice President, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and containing books and under-tidage and other writings obligatory in the nature thereof, and any such power of attorneys or certained and resident and the sinding upon the Company and any such power so executed and certified by such facsimile signature and tacsimile seal shall be valid and binding upon the function to any bond or undertaking to which it is attached.

Secretary IN WITNESS WHEREOF, The Eina Causely and Surety Company has caused this instrument to be signed by its , and is corporate seal to be hereto affixed, this 21st day of January . AD. 1965.

The Ætna Casualty and Surety Company

se of Connecticut se Harriard mary of Hartford

Secretary

Notary Public

On this 21st day of January , A.D., 19 65, before me personally came D. N. GAGE, me known, who, being by me duly sworn, did depose and say: that he is Secretary of be Alma Casualty and Surary Company, the corporation described in and which execute i the above instrument; that he knows the seal of said correction; that the seal affixed to the said instrument is such corporate seal; that it was so am sed by authority of his office under the By-laws of said corserios and that he signed his same thereso by like authority.

CERTIFICATE

24 ............. March 31, 19 66.

Leone U.

Secretary of The Æine Casualty and Sereny Comrany, a mock rades of the Sense of Connecticut, DO F. AZBY CERTIFY that the foregoing and arm hed Power of Attorney and Certificate of Auch pricy remains fall force and has not been revoked; and furthermore, that Article IV-Sections 8 and 10, of the By-laws of the Company, and the Res lution of une med of Directors, as set forth in the Certificat s of Authority, are now in force.

Signed and Sefied at the Home Office of the Company, in the City of Harrford, feate of Connecticut. Dated this March AD, 1965

Seretary

EXHIBIT D-98 - ANALYSIS OF COMPLETION	1051a
Circle your of Completion Coster for Genera	l Construction.
and Sete Wark Following Defauet of Fa	arise and
martin	:
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. 7.1	1
1. Fabrigio and murtin, Seneral Construction	
and Sete Warh Contract as of March 1, 1966	
including change writers # 15 and # 16	!
not approved by the Board	2,641,697_
2. Payments For General Construction	
and Lete Wark and attendant	
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Gayments to Fabrica & Mortin 2,126, 756  Gayments to mars In rul 428, 164	
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0 - + 2	
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and insurance' 9,349	
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march 1,1966 21,358	2,807,127
Docrewel 1, 1966 21, 358  3. Completion Casts for General Construction and Site Wark	165,420

Increased project casts for clerk of the works and insurance (as per discussions with Judge Carter and me sawers en cross examination) Clerk of the Warks (1/2 of 15,098 paid between september 1965 from sharch 1,1966 Cast 7,549 Susurance (8 months of premiums for builders rich insurance between march 1, 1966 and hovember 1966) @ 225 per month 1 9, 349 Total Increase in architects Basic Fee Resulting From Increased General Construction Cast after march 1, 1966 Fabricia & martin Completed Construction Certified by the architect march 1,1966 2,429,476 mars normal General Construction 428, 16.1 mc namce & Co Heneral Construction 102,017 Bradiuret General Construction 29,329 988 986 Fabricio Contract and Change arders (98) 2,641,697 for Oleveral Court. as of much 1,1966 added Construction Cost lifter march 1,1966 347,289 added Besie Fee Beiond 3/1/66

165/250 = 66 %

Total Interest for 250,000 in notes and bond issue (Exhibit 95)

nates 49,049 Bonds 125,749

Total for the 250,000

174,798

× 66%

Splicable to the 365,000 in increased general construction and peter work pasts \$ 115,366

Lummary of lamages

Completion Casts 165,430
Satures on barrowing 115,366
280,796

# 40509

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68 Civ. 1162

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FINDINGS AND OPINION OF DISTRICT COURT DATED UNITED SUMMED DISSAINT COURT MARCH 27, 1974 SCOVINGIA DYELLITOT CO WALL YORK

VALRESTO & Handrill, Mand wordend,

... :lantiff,

- against -

THE EDING OF EDUCATION CHAPRAL SCHOOL DISTRICT DO. 2 OF THE TELLS OF BLDFORD, HEN C. S. TE. MOLTH CASLED and POUND RIDEL, MARS ALCCULATED, THE and HORMEL CONSTRUCTION COLP. OF HEA ECCHELIE, a joint venturo,

Defendants,

- and -ARTHA CASUALTY AND CURITY CO..

> Additional Befordent on the Counterclain of defendant The Board of Education.

APPEARANCES

EAR 2 7 1974

Leglie A. Hynes, Esq. 25 Droadway How York, New York 10004 Attorney for Plaintiff

Louis E. Yavner, Esq. 60 East 42nd Street New York, New York 10017 Attorney for Dafendants

Max E. Greenberg, Trayman, Harris, Cantor, Reiss & Blacky 100 Church Street New York, New York 10007 Attorneys for Additional Defordant

CARTER, District Judge

The Burney of the state of the

## Packeround Factor

The plaintiff car anded this action to recover \$708,526.15 it claims is due from the defendant school board in respect of work, labor, services and materials furnished by plaintiff in the construction of the Eadford Middle School in the Town of Bedford, Westchester County, Now York. The defendant, the Board of Education of Central Echool District #2, counterclaims for \$451,796 constituting the value of services contracted for and not received, excess cost required by it in hiring another contractor to finish the construction of the school, and the costs of bonds needed to finance additional construction and interest thereon. Actna Casualty and Surety Co. ("Actna"), on the grounds that a fraud was perpetrated on it, counterclairs for payments made on a performance bond and for legal costs incurred in defending against this action and other claims.

The basic facts are not in dispute. In November, 1963, the defendant ("Board") invited bids for the construction of the Bedford: Middle School. Plaintiff, Tabrisio and Martin ("Pabrizio"), entered a bid for general construction and site work. The bids were opened on January 7, 1964.

On January 9th Pabrizio advised the Board that it had misca..chiated by \$171,000 and requested permission either to

withdraw its bid or to increase its bid price by \$171,000, unking its total bid \$2,497,000. Apparently because head Construction Co. was the lowest bidder, there was no direct response to that communication.

On Pebruary 5, 1964, however, Rand notified the Board that it withdraw its bid because of its discovery of a mathematical error. The Board accepted Rand's withdrawal and met with Fabrizio on Pebruary 10, 1964. There, the miscalculation was discussed and the Board accepted Fabrizio's contention that it had underbid by \$171,000. The Board suggested that Pabrizio eliminate agreed-upon items of work totalling \$171,000 so that the contract could be awarded to Fabrizio at the original bid of \$2,326,000.

this course of action and implemented its effectuation. A contract was signed on March 17, 1964 between Fabrizio and the Board for construction of the school pursuant to the original plans and specifications and at figures set out in the bid as originally submitted by Fabrizio. On the same day a change order was prepared providing for the elimination of certain items called for in the plans and specifications. No price evaluation was made as to these changes. The effect of this change order was to permit Fabrizio to have a savings on the costs of construction of \$171,000; that is, it was allowed to cut out \$171,000

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a pudaucion or \$177-100 from the lid ordrictor. The

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Note: a call and an streety on a parfollment bond in respect of the Banch 17, 1900 agreement, but it had no knowledge of the epromitat between the Board and Published to violate Section 100 cd the Man York Coneral Municipal Law Ly altering the plane and epocifications in order to enable Fabricio to do the work at its original bid price. A year later on Harch 23, 1965 a supplemental agreement was entered into by the Board and Fabrizio. Autna egain was surety on a performance bond in respect of this agreement. Aetna was wanware of the transactions and agreement which rendered the contract, performance of which it was guaranteeing, wold and unenforceable until institution of this action.

Construction began and dispute arose from almost the outset. The Board was slow in paying the monthly requisition which the contract called for. It delayed executing change orders with prompthess and failed to make payments for work completed as prescribed and refused to allow extensions when emtra work was required. Differences between the parties continued to magnify, and on March 2, 1966 Pobrisio advised the Board that it was torminating the

contract. On April 5, 1966 the Board, Fabrizio and Astan met to seek to datermine whether their differences could be ironed out. Actno proposed a solution and Fabricio agreed that if that solution was acceptable, it would complete construction by Suly, 1966. The Loard, however, decided to secure another contractor to complete construction and awarded the contract to complete construction to Mars Hormel.

## Prior Determinations

There have been three prior decisions which directly affect determination of this controversy. This court (McLean, D.J.) hold on February 21, 1967 that the contract between the Board and Fabricio was void and unenforceable since it had been made in violation of the requirements of compotitive bidding in the letting of public contracts, mandated by Section 103, Now York General Municipal Law.

On October 2, 1968, this Court (Ryan, D.J.) granted defendant's motion to strike the complaint but denied its motion for summary judgment in respect of its counterclaims on the grounds that as to the latter thors were factual disputes requiring resolution. The Court of Appeals on December 15, 1971 ordered a separate action brought by the Board against Aotna to recover on the latte performance bond consolidated for purposes of trial with the action brought by Fabrizio against the Board.

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Judge Tyan held:

the that may claim being present the life of which a matter cololy mades at or in garmoun marrit, must be systemen as weenforceable.

He specifically ruled that any action brought by the plaintiff to recover for entra work and material furnished at the request of the defendant was insufficient in law insofar as it acces out of the prime contract which was void. An attempt to couch such a claim in terms of quantum meruit could not succeed.

Judge Ryan's conclusion continues to be appropriate in respect of the plaintiff's claims, whether defined as breach of contract, quantum memble, or fraudulent inducement. Under New York law no recovery can be had by a bidder on a contract which is void under the competitive bidding statutes.

"The provisions of the statutes and ordinances of this State requiring competitive bidding in the letting of public contracts evince a strong public policy of festering houst competition in order to obtain the best work or supplies at the least possible price. In addition, the obvious purpose of such statutes is to guard egainst favoritism,

improvidence, entravagance, fraud and corruption. They 'are enacted for the benefit of property holders and texpayers, and not for the benefit or enrichment of bickers, and should be so construed and administrated as to accomplish such the pass fairly and reasonably with sole reference to the public interest. ... A contract propublic policy and recovery cannot be had upon any theory. Decad contracting Corp. V. H.Y.C. Transact Authority, 22 H.Y. 2d 187, 292 H.Y.B. 2d 98, 103 (1966) (emphasis added).

Accord, S.T. Grand Inc. v. City of New York, 38 A.D.

2d 467, 330 N.Y.S. 2d 594 (1st Dept. 1972), aff'd 32 N.Y.

2d 300, 344 U.Y.S. 2d 933 (1973); Gerrof v. Sweeney, 22

N.Y. 2d 297, 292 N.Y.S. 2d 640 (1968); Marino, et al. v.

Town of Remapo, 68 Misc. 2d 44, 326 N.Y.S. 2d 162 (S.Ct.

1971).

plaintiff claims that extra costs and expense to it for which it seeks recovery is for work not called for in the contract but which it was required to do by the Board. While plaintiff might be morally correct in assuming that it should be recompensed for additional work done at the behest of the defendant, the possibility of such work and additional payments were forescen in the void contract and must fail as arising out of that contract. Since unquestionably all of plaintiff's claims have their origin in the illegal agreement, they are insufficient in law.

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May the Board Recover from Fabrizio and Retna \$280,796 for the Additional Couts In Facultad in Completing Consciously of the Description of the Couts of the Mill Mill, see Consciously of Value or North Education and Educations?

New York Court of Appeals in Garzof v. Guceney, 22 N.Y.
2d 297, 292 N.Y.S. 2d 640 (1968). In that case, which
has been extensively applied in earlier opinions in the
immediate dispute, a contract fully performed in violation of the competitive bidding statute-was held to be
illegal and void. The purchase and installation of a
generator which was larger and more expensive than had
been authorized was the matter in issue. The contractor
was found to have worked actively to prevent competitive
bidding. There the court said at 646:

"The Village was diverted from the purchase by the persistent efforts of Nordberg to persuade the trustees, in disregard of the determination of their own Water and Light Commission, to rowrite the specifications in a way that would prevent any other manufacturer from submitting a competitive bid. The successful result of the cynical maneuver in the course of which a Nordberg employee became, to all intents and purposes, the author of the specifications - was the illegal purchase of the far more costly Nordberg engine."

that the law in New York made illegal any payment made or received under a void centract. See Albert Supply and Fauitable Co. v. City of Cohoes, 18 U.Y. 2d 969, 278 N.Y.S 2d 207 (1966); Seif v. City of Iong Beach, 286 N.Y. 382, 36 N.E. 2d 630 (1941). A bidder who had received payment under an illegal contract was required to return such payment in full even if it meant unjust enrichment for the municipality.

full recoupment of payments under the illegal contract, the court fashioned what it considered to be a more equitable result. It found that public policy could be protected without requiring the contractor to forfait all that it had received, while allowing the Village to keep the generator.

The sheer magnitude of the ferfeiture that would be suffered by the defendant Nordberg, as well as the corresponding enrichment that would enure to the Village of Freeport, under Special Term's determination adds an element to this case which is not to be found in any of those in which the principles we have been discussing have been applied.

But we must recognise that the rule with which we are concerned has unique aspects that make it appropriate for

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us to take into account the severity of its impact in cases as extreme as the present one. The purposes of our competitive bidding statutes may be fully vindicated here without our rendering so Dracenian a decree as to subject the defendant Northerg to a judgment of over three quarters of a million dellars." Gerzof, 292 N.Y.S 20 at 645.

The equitable remedy worked out was that the defendant was required to pay the difference between the price it received on the collusive bid and the price originally authorized for the smaller generator. It was also required to pay the additional expense incurred in installing the larger generator as well as the interest which the village had to pay on bonds it issued to finance the acquisition of the generator.

In S.T. Grand, Inc. v. City of New York, 38 App., 2d 467, 330 N.Y.S. 2d 594 (1st Dept. 1972), aff'd 32 N.Y. 2d 300, 344 N.Y.S. 2d 938 (1973), in which a contract was declared void under the competitive bidding statute, the court had no difficulty at all in dismissing the cause of action for the unpaid balance due to the contractor, leaving it with a \$115,000 loss. The more difficult question it faced was in light of the \$115,000 loss, whether allowing the city to recapture the \$690,000 it had already paid for work done would have placed a disproportionately heavy burden on the contractor. Under the circumstances the court permitted the city to recoup whatever it had paid.

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ground that in the case before it bribery was utilized to prevent competitive bilding and to have the contrast award do the places. In addition, in Castof these was no dispute as to the Village's mod to supplement its power plant by the acquisition of a generator and the loss as a result of the added expense could be computed fairly accurately, the court could fashion a resoly so as to restore the village to a position originally authorized. What was of particular concern to the court in S.T. Grand was the gross fraud involved. As to that it said at 330 N.Y.S. 2d 598:

"In light of the flagrant corruption
permeating the instant contract, the
total avoidance of the public bridding
and the public's deprivation of an
honest, disinterested determination
as to whether or not the work contracted for was even needed, to
require this respondent to return
the fruits of its criminal conduct
should not offend the conspicace."

These cases do indicate that there is some leavey in devising remedies where competitive bidding statutes have been violated. Elements that are considered are the "magnitude of the forfeiture," "the corresponding enrichment," and "the severity of its impact." In determining whether such equitable considerations should be applied, factors such as the level and

in the immediate case, unlike E.T. Grand, does not approach bribery, and there was no doubt that the public needed and had authorized construction of a school.

for an element of discretion by the trial judge. Judge Ryan hold that any claim by the Ecard for damages flowing from breach of the prime contract and supplemental agreement cannot be sustained, because those agreements were illegal. What is now open is the factual determination of whether any damages incurred by the Board were a direct consequence of the illegal contract. If so, they could be recovered under principles established in Gerzof.

The fact that it might have been the Board which was primarily responsible for the illegal contract, or that its conduct may have justified plaintiff's failure to complete construction is not dispositive of the right to damages. The illegal acts of the Board do not mitigate the harm to the public resulting from a violation of the law. The public interest is the one which is to be protected, and it is not to suffer because of the wrongloing of its officials. On the cither hand, there is no authority for the proposition that the Board is entitled to recover from the plaintiff whatever empenses it incurred in the construction of the school, regardless

of whether they were a direct consequence of the illegal contract. Admittedly, the distinction between damages arising from breach of the contract and as a direct result of the illegal contract is somewhat vague.

that must be stressed is the vindication of the competitive bidding statutes and preventing illegality. Under the circumstances of this case this can be effectuated both equitably and appropriately by asking what expenses were incurred that were intrinsic to the illegality. These expenses are recoverable regardless of where fault lies for the termination of Pabrizio's services and its failure to complete construction. This is what the court in Gerzof, seems to have had in mind when it authorized damages consisting of the increased price of the illegally installed generator, the difference in cost of installing that generator, and the interest paid to finance the purchase of the more expensive generator.

immediate case leads me to conclude that the Board cannot recover for the expenses incurred in completing the school. The work stoppage, failure to meet the terms of the contract, the securing of another contractor, and money expended to complete construction were not a direct consequence of the illegal contract. The expenses arose out of breach of the contract by one party or the other, thus

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the competitive bidding plate is and preventing illegality. Under the electromess of this core this can be effectuated both electromes of this core this can be effectuated both electromes and appropriately by acking that emperors were incurred that were intrinsed to the illegality. These expenses are recoverable regardless of where fault likes for the termination of hamiliate's convices and its failure to consider a materialism. This is that the court in Gereof cause to have had in minimum it authorized demages consisting of the increased price of the illegally installed generator, the difference in cost of installing that generator, and the interest paid to finance the purchase of the more expensive generator.

Applying this remained to the evidence in the immediate case leads as to conclude that the Board cannot recover for the expenses incurred in completing the school. The work steppage, failure to meet the terms of the contract, the security of enother contractor, and mancy are pended to complete construction were not a direct consequence of the illegal contract. The expenses are seen of breach of the contract by one party or the other, thus

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forcelosing recovery. Plaintiff cannot be held liable for failure to complete or for breach of a void contract.

S171,000 against Pabricio and Astma for the value of work, labor, and services which it alleges was illegally removed from the plans and specifications of the project by the improper change order executed dantemporaneously with the March 17, 1964 agreement. It is argued that to this extent the public was deprived of elements which should have been in the original contract and bid upon. Plaintiff counters that the Board received exactly what it was entitled to receive since the price was reduced by \$171,000. It is also argued that this claim was raised for the first time in post trial briefs.

Admittedly, this situation differs from that inthorzof incofar as the illegal contract in this case was for a lower price than originally authorized, while in Gerrof the Village had to expend more money. Yet, it cannot be said that the public was not harmed or that the policy of the competitive bidding statutes was not thwarted to the extent that contract requirements and work were eliminated without determining whether the new specifications could be performed at a lower price than agreed to with the plaintiff. As Judge McLean recognized:

"No one can hav with certainty that it about 10 hour plant had been made

while combant by this this would not have become a.

The intent of the violated statute is to product the public by ellewing all bidders an equal or portunity. The public, therefore, has been damaged to the entent changes in the plane and specifications and costs were made in a non-compatitive process. Thile it cannot be ascertained whether, or exactly how much charger, another bidder could have parkeamed the altered contract, the policy bohind the statute demands that the illegal bidder bear the full burden of his illegal deal. This is atill substantially loss than requiring, as the law allows, full recompone of everything paid by the district. The argument that the district received dollar for dellar what it was entitled to recoive is really premised on the principle of quentus maruit and to that extent is inappropriate. In Cargor, the generator which the Village received was actually worth the increased price which the village- paid for it but that did not prohibit rocovery. It is not the value of what was received that is the standard of recovery, but rather the damage arising out of breach of the law requiring competitive bidding. Hare, however, that damage cannot be said to

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bo \$171,000. Unlike Carrof, the contract here called for a lower, not a higher, price for construction. Moreover, the bid below Fabrizio had been withdrawn because of a miscalculation thick would have that it higher than Fabrizio's. The next bid substitted to do the job originally called for was \$259,000 granter than the Pabricio contract price. The public was not really deprived of \$171,000 in. construction and materials. We can only speculate as to whother and to what entent the altered plans and specifications would have produced savings to the public if the regisite bidding had occurred. What we do know is (1) that the public was not deprived of \$171,000 in construction and materials and (2) the value of the unpaid for services, labor and materials received by the Board for which plaintiff seeks recovery of \$708,526.15 is far in excess of \$171,000 in construction and materials deleted from the original plans and specifications. Since plaintiff is not being allowed to recover for any of these unpaid services, labor and materials, and the public has thereby been enriched to that extent, equity would seem bost served by not altering the status quo. Hence, recovery by the Board of \$171,000 is donied.

To the Board Liable to Actua for Expenses the Latter Was Required to Incur by Virtus of Being Surety on an Illegal Contract Unknown to Bethe and Joined as a Party in the Litigation on that Yeard?

The additional defendant, Actno Casualty and Surety Co., contends that the failure of the Board to reveal

to Astra any evidence of the illegality of the contract was a fraul. By a result of such fraud, it is alleged that Astra isomething the second to and a commute labor tall material payment, bond under which Astra was required to make payments. Believe such approvery of those payments as well as the legal fees isomered in defense of this aftion and other claims, he being a direct result of the fraud.

Under the applicable haw York law, there are directed under under the suretyphip contract as to a enterial fact may constitute a fraud upon the serety. See Festuick v. Van Voorhis, 91 H.Y. 353 (1883); Deson v. Amiro State Sarety Co., 166 H.Y.S. 986 (2d Dept. 1916); Atlantic Feek of New York v. Carnegie Feel Corp., 263 H.Y.S. 2d 941 (App. biv. 1986). There were be demonstrated a dety on the part of the obligee to speak arising from knowledge of a material fact.

In order to constitute fraud, however, silence in the part of the obliged must be tentament to affirmatica of a state of affire which does not exist and which would have the effect of descriving or defrauding the surety. The obliged is not under an obligation to disclose to a surety internation of which the surety had knowledge readily to hand. A surety cannot 'reat supincly, close his eyes, and fail to make important information' and then seek to avoid liability under the guaranty

ty while has he was not as and death such and on the or of the such and on the co. The such as a such as a

The Given the Protest of this care, Y do not line that the Bound's valence was a deception which constituted fraud. The beard ald not sok nature to provide the sursty tends, nor was it mor assess any question by Astna. The board directed Palaisio to provide oursty bonds and hotne submitted an application to Pabricio, asking some quostions which were never ensuared. Astna ande little effort to discover the facts and discumptances surrounding the illegal contract, but rather appeared to raly on the fact that Pabricio was a good customer. Horcover, the evidence does not indicate that the Board knew that the contract was in violetion of law. To the contrary, the proof is that the Loard acted in reliance upon advice from its attorneys and accumed that it was acting properly. At best the Deard's knowledge of illegality was equivocal, making failure to disclose it insufficient to establish fraud. 47 H.Y. Jur., Euretychip and Guaranty, \$ 101.

Accordingly, the claims of plaintiff are dismissed; the counterclaims of the defendant Board, as well as the counterclaim of the defendant Astna, are also dismissed.

## The eleve constitutes the court's findings of

CERTAGO OS

HODERT L. CERTER U.S.D.J.

Dated: New York, The York Harch 36, 1974

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FABRISTO & FARTIN, INCORPORATED, Plaintiff,

Consolidated Actions

Pisinetii

66 Civil 2395(RLC)

-against-

68 Civil 1162(RLC)

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOURS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POURD RIDGE, MARS ASSOCIATES, INC. AND NORMEL CONSTRUCTION CORP. OF NEW ROCHELLI, A JOING VENTURE,

JUDGMENT

Defendants.

-and-

-and

AETHA CASUALTY AND SURETY CO.,
Additional Defendant on
the Counterclaim of
defendant The Board of

Education.

been brought on regularly for trial before the Honorable Robert L. Carter, United States District Judge, on March 1, 2, 5, 6 and 7, 1973, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on Barch 27, 1974, having handed down its opinion, constituting its findings of fact and conclusions of law dismissing the claims of the plaintiff; the counterclaims of the defendant Board, as well as the counterclaim of the defendant Aetha are also dismissed, it is,

DOUGHED, ADJUDE DAME DECREED, that defendants, THE BOARD OF EDUCATION CENTRAL SCHOOL LISTH OF NO 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, FORTH CASTLE AND POUND & DAME, MARS ASLOCIATES, INC. AND NORMAL CONLIGHED CORP. OF HER ROSELLES, A JOINT VERTURE, have judgment applied the electric, Park 100 Harrie, Laborponated, disclosing the castles, days.

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Dated: New York, h. 1.

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Alymond F. Burker

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MONORABLE: Robert S. Corling United Bitter Elle & Judge.

Tabrizio + martin, Ancorporated

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The Board of Education Central School Dutiet

no a of the Journ of Bedford, new Castle,

north Castle + found Ridge

mars associates Inc +

normal Construction Corp. of New Rochelle

a Joint Venture

altina Casualty + Surely Co.

Consolidated to trial war.

Now comes the Plaintiff By	
and moves the trial of this cause. Likewise comes the Defendant	
and moves the trial of this cause. Likewise comes the Defendant	Бу
Thereupon a Jury is duly empaneled and sworn, and the cause	proceeds to Trial
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